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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT

OF THE  
STATE OF CALIFORNIA,

DURING JANUARY AND APRIL TERMS,

1858.

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BY HARVEY LEE,  
COUNSELOR AT LAW, AND REPORTER OF THE SUPREME COURT.

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VOL. IX.

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# JUDGES

OF THE SUPREME COURT DURING THE YEAR 1858.

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HON. DAVID S. TERRY, ..... CHIEF JUSTICE.

HON. PETER H. BURNETT,.. }  
HON. STEPHEN J. FIELD,... } ASSOCIATE JUSTICES.

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THOS. H. WILLIAMS, Esq., .... ATTORNEY-GENERAL.

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HARVEY LEE, ..... REPORTER.

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CHARLES S. FAIRFAX, Esq.,... CLERK.



**JANUARY TERM.**



**CASES ARGUED AND DETERMINED**  
**IN**  
**THE SUPREME COURT,**  
**JANUARY TERM, 1858.**

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**BIRD v. LISBROS.**

In an action of ejectment, brought solely on the prior actual possession of the plaintiff, the defendant being a mere trespasser, the latter cannot justify his act by showing the true title to be outstanding in a third person.

But when the plaintiff in ejectment does not rely on prior possession, but on strict title, the defendant in possession, having a good *prima facie* right, may set up and show the true title to be in another party, for he thereby proves that the plaintiff has no title with which to overcome that which the law presumes to exist in the defendant by virtue of his actual possession.

Prior possession is evidence of title; but this evidence may be destroyed by abandonment.

Where the plaintiff relies solely on the possession of his grantor, having no other title, the defendant will be allowed to show that the grantor of the plaintiff, prior to conveying to plaintiff, had abandoned the land.

Such a showing would defeat plaintiff's action, in the same manner as if his grantor had made a prior conveyance to a third party.

In such a case, all the evidence of plaintiff's title rests upon the acts of his grantor, all of which he is bound to know, when another party is, at the time of his purchase, in actual adverse possession.

A party in possession of land is deemed in law the owner, against all persons but one having superior title thereto; possession is evidence of title, and the possessor, in conveying, is deemed to convey the title itself, sufficiently to enable his grantees to maintain ejectment against a mere trespasser.

**APPEAL** from the District Court of the Ninth Judicial District.

This was an action of ejectment, to recover the possession of premises, and damages for the detention of the same. The com-

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*Bird v. Liebros.*

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plaint contains two counts. The first sets up title and right of possession in plaintiff, by virtue of deeds of conveyance, from Downer and Garlow, who were, on the thirtieth day of July, 1855, seized and possessed of the premises in controversy. That Downer and Garlow, on that day, sold and conveyed the same to Ralph Bird, who took possession under said conveyance. That on the twenty-second day of February, 1856, Ralph Bird conveyed to plaintiff.

The second count sets up prior possession in plaintiff, dating from the twenty-first day of February, 1856.

Answer—general denial.

*Robinson, Beatty & Botts*, for Appellant.

Plaintiff proved some very doubtful acts upon the part of Downer and Garlow, to establish prior possession; such as, an enclosure, with a brush-fence, of some eight or ten acres, within which the lot in dispute, and many others, were enclosed.

There is no pretence to trace the title beyond Tatham, who took it up as public land, and sold it to Downer and Garlow. There are two ways, and two only, by which a plaintiff can establish his right to oust the actual occupant of real estate:

1. By the exhibiting a paper title, tracing back to an acknowledged source.

2. By proof of prior possession.

A deed from one having no title is a nullity; for the grantor can convey no more than he has. A deed from one who has no title, when taken with faith in the grantor's title, has sometimes been called color of title, and has been held available, for the purpose of extending an actual possession of a part, constructively to the whole tract included in the deed; but this is as far as this fictitious absurdity extends. It never has been held that color of title was sufficient to put an actual occupant to the proof of his title. This point has been decided by this Court. *Norris v. Russell*, 5 Cal. R., 250.

To succeed, the plaintiff must rely on the proof of his prior possession. *Plume v. Seward*, 4 Cal. R., 96.

Where a party can show nothing but a prior possession, that reliance may fail, if it be shown that he voluntarily abandoned his possession, without the intention of returning. *Bequette v. Caulfield*, 4 Cal. R., 279.

Mere possession, although evidence of title, is neither title nor an interest in lands. It is therefore not susceptible of conveyance or transfer. The actual occupant may, for a valuable consideration, abandon, and permit another to enter; but, in such a case, the new occupant holds by right of his own possession, and not in consequence of the possession of his predecessor.

There is no proof that the plaintiff ever was in possession. The only fact constituting possession is a fence, consisting part-

ly of brush and partly of a ditch, with which the eight acres were enclosed by Tatham, and Downer and Garlow, in February, 1854.

On the trial below, on cross-examination of Ralph Bird, plaintiff's grantor, plaintiff asked witness: "Did you abandon and relinquish all your right to the ground in dispute, to one Richardson, in the month of July, 1855, and did Richardson take possession of the ground by virtue of that relinquishment?" To which question plaintiff's counsel objected, and the objection was sustained by the Court. This was error in the Court, and against the doctrine laid down in *Bequette v. Caulfield*, before cited.

Plaintiff should show affirmatively that he has not abandoned his possession; that is, his possession should appear continuous and unbroken, up to the time of the ouster.

*Joseph N. Lewis* for Respondent.

To establish the first count, plaintiff introduced a deed of conveyance from Ralph Bird to himself, and also a deed of conveyance from Downer and Garlow to Ralph Bird. Plaintiff showed that the premises in controversy, as a part of a field, had been enclosed by a brush-fence and a ditch, in the summer of 1854. Downer and Garlow sold and conveyed a part of said tract, so enclosed, to Ralph Bird, plaintiff's grantor. At the time of the sale, Ralph Bird entered upon the property, and laid out the town of Oroville. Subsequently, Ralph Bird sold and conveyed the property to plaintiff, and possession was delivered, by an actual entry upon the premises. These conveyances, and the entry that was made under them, in the presence of the grantor, and by his consent, under the rules of the common law were sufficient. 2 Black. Com., 311.

The statute of this State dispenses with an actual entry, and livery is made by operation of law, and a conveyance vests the vendor's title without an entry. Comp. Laws, p. 518, § 34.

To support the second count, plaintiff proved that Downer and Garlow sold the property in controversy, as part of the enclosed field, to Ralph Bird, and that Ralph Bird took possession under color of title, there being no adverse possession at the time, in any one. Ralph Bird, being in possession of the entire tract, at the time he conveyed to plaintiff, passed his possession to the plaintiff. A party entering and claiming title *bona fide*, acquires in law actual possession, to the extent of the boundaries contained in his title, whether it be valid or not. *Hoge v. Swan*, 5 Md. R., 237.

Upon the doctrine of prior possession, plaintiff is entitled to recover, and to this end it is immaterial whether Ralph Bird abandoned the premises in controversy before the sale or not.

The act of abandonment, even if it were true, could not apply

to this case, since the plaintiff's right commenced prior to any that the defendant sets up.

The leading assignment of error, in this case, is the ruling of the District Court upon the following question: "Did you abandon and relinquish all your right to the ground described in deed 'D' to one Richardson, in the month of July, 1855; and did Richardson take possession of the ground by virtue of that relinquishment?"

The appellant contends that the object of this question was to show that Ralph Bird had abandoned the premises in controversy, before he executed his deed to plaintiff. It does not appear, from the record, that this was the object of the question.

The rulings and judgments of every Court are presumed to be correct, until the contrary is shown. The intendments of law are always in favor of such judgments. *Grewell v. Henderson*, 7 Cal. R., Jan. T., 1857; 2 Cal. R., 99, 145.

The question of abandonment and relinquishment was a question of fact for the jury to determine from the evidence, and not to be stated by the witness.

The question was improper, in this: First, that it is improper to ask a witness the intent with which a certain act is done. 2 Starkie Ev., 572.

Second, that, in all its branches, it related to new matter, and was not responsive to any question called out on the direct examination. *Thornburg v. Hand*, 7 Cal. R., Jan. T., 5 Cal. R., 450.

Third, that, if the object was to establish an abandonment, the question, in the form and matter that it presents, negates all such objects.

Fourth, that, if the question had any leading object as evidence, by its form and matter, it was to establish a right to the property in Richardson, from whom the defendant pretends to derive his right. *Winans et al. v. Christy et al.*, 4 Cal. R., 70.

A prior possession is evidenced by notorious acts of ownership, such as selling it by deed, for a valuable consideration, and the recording of the deed creates such an interest in land as makes it property, and the subject of sale, and is such an interest as can only be conveyed by deed. *Howard v. Easton*, 7. J. R., 205.

The error, if any, committed by the District Court, in overruling questions that were asked witness Ralph Bird, on cross-examination, was cured by subsequent cross-examination, on the same subject-matter. *Montgomery v. Hunt*, 5 Cal. R., 366.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover the possession of premises situated upon public land. On the trial of the cause in the Court

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Bird v. Lisbros.

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below, the counsel of defendant asked the witness, Ralph Bird, the plaintiff's grantor, "whether he had not relinquished and abandoned all his right, to one Richardson, in July, 1855, and whether Richardson had not taken possession of the premises, by virtue of that relinquishment?"

In the case of *McMinn v. Hays*, 4 Cal. R., 209, it was said: "The prior possession of Williams, the plaintiff's grantor, was sufficient to maintain a recovery in ejectment." And, in the opinion of the Court in the same case, it was also said: "The fair deduction from the record is, that, at that period, the tenancy of Palmer ceased, and, consequently, Williams was entitled to possession, and the acts of Shattuck, as his agent, removes any idea of his abandonment of the premises." And in the case of *Bequette v. Caulfield*, 4 Cal. R., 278, the learned Judge who delivered the opinion of the Court said: "We have often held that possession is evidence of title; but it is equally true, that possession gives a right of action against a mere trespasser, even when title may be shown to exist in another. So, where a party can show nothing but a prior possession, that reliance may fail, if it be shown that he voluntarily abandoned his possession, without the purpose of returning."

In these cases, it is clearly held that prior possession is evidence of title; and that this evidence may be destroyed by abandonment. And it would seem to be clear that, if a party can acquire a title by possession, he may destroy it by abandonment. If, however, the possession were continued for a period corresponding with the Statute of Limitations, then it might admit of great doubt whether the party could destroy the evidence of his title by simple abandonment.

But the question in this case is, whether the defendant, not having connected himself with Richardson's title, and not having shown that the plaintiff was aware of the alleged abandonment of his grantor, can be allowed to show his abandonment?

It was held, in one of the cases cited, that a mere trespasser cannot show title in a third party. This is no doubt true, as a general proposition. But it is not of universal application. For example, we will suppose A has the true title, but not the actual possession of real estate, and B takes possession, and C then ousts B of his possession. In a suit by B to recover possession from C, the latter cannot set up in bar the outstanding title of A. The possession of C gives him a *prima facie* title; but the prior possession of B proves superior to this *prima facie* title of C. If it were otherwise, and a mere trespasser upon the *prior actual* possession of a party could justify his act by showing the true title outstanding in a third person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the Statute of Limitations. In the case supposed, were this the rule, C could

turn out B, and justify; and D, for the same reason, could, in turn, oust C. The true owner not being disposed to assert his superior title, there could be no repose obtained by the several trespassers, as between themselves.

But when the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession having a good *prima facie* right, may set up and show the true title to be in another party. By showing this fact, he proves that the plaintiff has no title with which to overcome that which the law presumes to exist in the defendant by virtue of his actual possession.

But this case presents a different question. The defendant did not simply offer to show that there was a superior outstanding title in a third party, but that the grantor of plaintiff, by his *own act*, had abandoned the premises, and thus destroyed the only *evidence* of his title. In ejectment, the plaintiff must show title in himself as against the defendant. But when he fails to show *any* title in himself, he must fail. Suppose that the defendant had proved that Ralph Bird had previously conveyed the property in controversy to another party. He certainly could have done so, and this would have defeated the plaintiff's action. And if he could have shown that no title was in plaintiff, because of this act of his grantor, he must be allowed to show that, by the act of Ralph Bird in abandoning the premises, there was no title in the plaintiff. In the case of *Bird v. Dennison*, it was substantially held, that when a party relied upon possession (whether of himself or of his grantors,) as his *sole* evidence of title, he must be held to know the acts of those through whom he claims; and that the actual adverse possession of a party, at the *time* the deed was made, was notice to the purchaser. The purchaser is bound to know the chain of title through which he claims; and if that chain only leads him back to the possession of his grantors, and the period of that possession is short of the time fixed by the Statute of Limitations, he must be held responsible for *all the acts* of those through whom he claims. All his evidence of title rests upon the acts of his grantors; and if he claims the benefit of some of their acts, he must share the responsibility of those that may be against him, when another party is, at the time of his purchase, in the actual adverse possession of the premises.

If these views be correct, the question was proper, and should have been allowed. It did not matter whether the defendant claimed under Richardson or not; Ralph Bird, as alleged, having, by *his own act*, destroyed all evidence of title, had no title to convey to the plaintiff; and as the premises were, at the date of the deed, in the adverse actual possession of others, the plaintiff had notice, and purchased at his peril.

It is insisted by the defendant, that, to maintain ejectment

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under prior possession, the plaintiff must show such possession in himself; that possession is mere evidence of title; but is not title itself, and therefore cannot be conveyed to another.

But the answer to this objection is very simple: Possession is evidence of title; and the party in possession is therefore deemed, in law, to be the owner; and when he conveys the land to another, he is deemed, in law, not to convey his evidence of title, but the title itself, of which the law, by reason of such evidence, adjudges him the owner, as against all others not having a superior title. This point was decided by this Court in the case of *McMinn v. Hays*, already cited.

The judgment of the Court below should be reversed, and the cause remanded for further proceedings.

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LUDLUM v. THE FOURTH DISTRICT COURT.

A *mandamus* will not issue to compel the Court below to enter a decree upon the report of a referee; the remedy is by appeal.

*Quære*, whether a *mandamus* is the proper remedy where the Court below refuses to enter a specified judgment, as directed by this Court.

## APPLICATION FOR A MANDAMUS.

The plaintiff, Anthony Ludlum, was one of the intervenors, with Thomas A. Lynch and others, in the case of *Alvin Adams v. Woods & Haskell*, and held a lien against the estate of Adams & Co., by attachment, judgment, and execution. The intervenors in that case based their right upon two grounds: first, fraud on the part of the copartners, in bringing the suit; and second, priority by virtue of intervenor's attachment. The Court below permitted the intervention to be filed, but refused to stay proceedings in the case, or afford the parties any affirmative relief, but directed the receiver to proceed and distribute the money in his hands *pro rata* among the creditors; from which order the intervenors appealed to this Court. The case was argued and determined at the July Term, 1857. The Court decided that the intervenors had acquired a lien upon the property of Adams & Co., by attachment and judgment, prior to the decree of dissolution, and that they were entitled to be first paid, and reversed the judgment below. The Court below, not understanding the decision of this Court, ordered that a *pro rata* distribution of the money to the several creditors of Adams & Co., be made. From which order and judgment, intervenors again appealed to this Court. The case was fully and elaborately reviewed and decided at the January Term, 1858, reversing the judgment of the Court below, and directing the Court to enter

"a decree directing the receiver to distribute the proceeds in his hands, and all such proceeds as may hereafter come into his hands: first, to the several intervenors in the order of the priority of their respective attachments, and then the remainder to the other creditors *pro rata*."

The plaintiff, in his application for a *mandamus*, alleges that on filing the *remittitur* in the Court below, one of the attorneys for the intervenors moved the Court, upon notice to the parties in said cause, they being present by their attorneys, and not objecting, for an order of reference to ascertain and settle the amount and nature of the liens upon the estate and moneys of Adams & Co., in the hands of the receiver, and the order of their priorities, which motion the Court refused to entertain, but ordered the said cause for trial as a chancery cause. That afterwards, to wit: on the eleventh day of September, 1857, the said cause was regularly called for hearing, and all parties to the record being present by counsel, the intervenors offered in evidence all the records and papers on file in said cause, the defendants admitting the claims, attachments, and judgments, of intervenors, and the intervenors being about to introduce further evidence in proof of the allegations of their intervention, the Court ruled, that under the decision of the Supreme Court such proof was unnecessary, and that he would make the order of reference to ascertain the priority of the liens of the intervenors, which was all that was necessary. J. A. McDougall, an attorney for the intervenors, then presented to the Court an order of reference, directing the referee, to be appointed, to report upon all liens, by attachment or otherwise, in the order of their priority; which order the Court refused to make. The Court then stated that attaching-creditors claiming further liens, might file their intervention at any time before the report of the referee, and such claims should be referred to the referee for report, with other claims of intervenors. That afterwards, other attaching-creditors did file their intervention, and the same were referred to the referee. On the twenty-third day of September, 1857, the referee (Fletcher M. Haight,) made his report upon the several liens, in the order of their priority. On the twenty-first day of November, 1857, Cohen and Jones, as assignees, and Cohen as receiver, filed certain stipulations, waiving all claims to the moneys in the hands of the receiver. The intervenors then moved the Court for an order of distribution of the money in the hands of the receiver to the attaching and intervening-creditors, according to the report of the referee, which order the Court refused to make, or at that time to make any order in the premises, but stated that the Court would make an order of distribution on the Wednesday following. On Wednesday, the Court postponed the making the order until Saturday, when the Court rendered a lengthy opinion, and directed an order to be

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entered "distributing the moneys in the hands of the receiver *pro rata* amongst all the partnership-creditors whose claims have been reported and confirmed under the orders of the Court, and after the payment of the partnership debts, then the individual debts of the partners."

The plaintiff, Ludlum, further alleges, that the District Judge of the Fourth District Court, from time to time, when said case was called up in Court, and when moved by intervenors, did represent and intimate from the bench, that the distribution would be made to the attaching and intervening-creditors, in the order of their priorities, and that the Court only delayed ordering such distribution until the several accounts of the receivers and assignees in the case could be passed upon, and until the Court ascertain what sum would remain to be so distributed.

That the District Court, by means of such representations and intimations, did induce counsel of said intervenors, to make various stipulations and sacrifices to expedite and facilitate the disposal of the questions arising upon the settlement of the accounts of the receivers and assignees. The Court did also induce and influence the said counsel of said intervenors to submit the matters of said intervention at the trial, without any other evidence in support of the allegations of fraud and collusion, as set up in their several complaints of intervention, than what appears from the pleadings and papers on file in said cause, although plaintiff had other and conclusive testimony ready to be submitted to said Court, establishing said allegations of fraud and collusion. That the District Court has refused to enter any order of distribution other than the one above specified. Plaintiff asks for a *mandamus* against the said District Court, commanding said Court to carry out the judgment and determination of this Court, in the case of *Adams v. Woods & Haskell*, on the intervention of T. A. Lynch and others, and to make the distribution of the moneys in the hands of the receiver, according to the priority of the liens, etc.

An alternative writ of *mandamus* was issued, on the application of plaintiff, against the said District Court. On the return of the said alternative writ, John S. Hager, Judge of the said Fourth District Court, filed a lengthy written answer to the petition of plaintiff, making an exhibit of his minutes as Judge of said District Court, in said case, and setting forth the various orders and decrees, made from time to time, in the progress of the said case of *Adams v. Woods & Haskell*.

The answer admits motion made for an order of distribution, but avers that one G. F. Sharp, attorney, opposed the same for some of the creditors; also, denies that the Court ever intimated that it was unnecessary for intervenors to proceed further with their testimony; also, denies that the District Court

ruled that none but intervenors could claim the benefit of their liens, and that they must be first satisfied.

Answer further admits that the Judge of said Court has spoken, both off and on the bench, of a final decree and distribution in general terms, but never of a distribution to any particular class of creditors. Answer avers that there were claims and reports in favor of former receiver, and of Cohen, Roman, and Jones, assignees, and of Naglee, receiver, the several amounts of which far exceeded the fund in Court, and it was necessary to pass upon these claims and reports, before a decree of distribution could be made.

In respect to the charges of plaintiff of delay, etc., answer alleges that he was ill a portion of the time, and much pressed with business, and had not time to examine and make up his opinion. Answer denies the right of plaintiff to a writ of *mandamus*, and alleges that the plaintiff had a full, speedy and adequate remedy, by appeal from the judgments and decrees of said District Court; answer also denies any intention to disregard the decision of the Supreme Court, and avers that the decrees of said District Court were made as he understood and interpreted the law.

*James A. McDougall* for Plaintiff, Ludlum.

The power to issue the writ of *mandamus* is co-extensive with the power of the King's Bench, and is a necessary power. State Constitution, Art. VI, § 4; Practice Act, 467-8; *People v. Turner*, 1 Cal., 143; *Russell v. Elliott*, 2 Cal., 245.

Upon consideration it will be perceived, that without this power vesting somewhere in the government, complete justice could not be rendered, or perfect right maintained intact, in a great variety of cases.

The writ of *mandamus*, although originally a prerogative writ, has, for a long time, like the writ of error, become a writ of right. *Kendall v. U. States*, 12 Peters, 613.

This rule is laid down in numerous modern cases, and particularly and fully in a case in 14 or 15 Howard. The English rule will be found in 2 Stra., 949. That the Court will exercise a discretion when the facts or right is doubtful, is not disputed.

The former reversal, judgment, and opinion, of this Court, imposed on the Fourth District Court the duty to distribute the funds to us, as attaching-creditors, in the order of our priority, if we are attaching-creditors as alleged. This was not disputed in the Court below, but was admitted by express stipulation on the part of all the parties to this suit. It was not only the duty of the Court, but it was the ascertained right of the intervenors to have such distribution. *Dewey v. Gray*, 2 Cal., 374. This duty is ignored, and the right denied by the Court below, and we are told, that instead of a right to the order, we have only

the right to appeal. We say, we cannot be required to appeal after the matter has been once adjudged in this Court.

There is no method whereby this duty can be enforced, or this right maintained intact, except by *mandamus*.

The cases relied upon by respondent, are none of them cases where the appellate tribunal had acted upon the subject-matter, and once determined, and consequently exhausted or terminated the discretion of the subordinate Court, and where an absolute right in the party litigant had accrued, to have a certain course of procedure. The Court below had no more discretion as to the matters passed upon, than had the P. M. General, in *Kendall v. U. States*, 12 Peters, 613-14, or than the District Court in *Johnson v. Glascock*, 2 Ala., 519.

Without this Court take back the opinion, 2 Cal., 374, and the still later opinion in \_\_\_\_\_ v. \_\_\_\_\_, the opinion of this Court, in a particular case, is an authoritative direction to the Court below, and is the law of the case upon which the rights of the party, so far as the inferior tribunal is concerned, may rest. And this is peculiarly the case, in a case of equitable cognizance.

This case is within the common law rule, as to this writ. 3 Black. Com., 110 marg. p.; 1 Salk., 299; 1 Stra., 213; Sir T. Raymond, 214; 1 H. Black., 640, 467; 1 Wilson, 283; 3 Eng. Law and Eq., 412.

The action and opinion of the Fourth District Court, was a direct and contemptuous departure from the opinion of this Court, See opinion returned, and *Adams v. Conerly*, Jan. T., 1857; *Case of Intervenors*, July T., 1857; *Nagle v. Minturn*, Oct. T., 1857.

#### *Gregory Yale* for Respondent.

Counsel, to show the authority of this Court to issue writs of this character, cites § 4, Art. VI, of the Constitution of this State; § 7, act of May 19, 1853; Practice Act, 466, 467, 472, 473, 474, 476; § 65, act of 15th May, 1854.

It has been held, that a *mandamus* is not the proper remedy to remove to this Court the records of the District Court, but that a *certiorari* should be issued in the case decided. *People v. Turner*, 1 Cal., 152.

The Supreme Court of the United States, in the case of *Marbrug v. Madison*, 1 Cranch, deny the power to issue the writ under the Constitution, although directed by act of Congress. The Constitution excludes original jurisdiction in all cases except those enumerated, and a *mandamus* is an original suit. *McIntire v. Wood*, 7 Cranch, 504.

In Kentucky, it is expressly decided, that the writ is not necessary to the exercise of appellate jurisdiction, and this Court possesses no other. *Lawless v. Rees*, 1 Bibb, 496.

Upon another head, as to controlling judicial discretions, this

Court has passed, in accordance with the general rule established by the authorities. *Fowler v. Price*, 2 Cal., 165; *People v. Bell*, 4 Cal., 177; *People v. Olds*, 3 Cal., 167.

It is not the proper remedy, when an inferior Court refuses to enter a judgment for costs. *Peralta v. Adams*, 2 Cal., 596. In *Russell v. Elliott*, 2 Cal., 246, this Court directed the District Court, by *mandamus*, to enter a judgment on a referee's report, upon the ground that the defendant, who applied, was without any other remedy.

*Mandamus* is a prerogative writ, and not a writ of right. *Tapping*, 58, (orig. p., 5;) *Ex parte Fleming*, 4 Hill, 583.

*Mandamus* not granted, where there is an adequate remedy. *Ex parte Lynch*, 2 Hill, 45. Nor where writ of error, appeal, or *certiorari* will lie. *People v. Collins*, 19 Wend., 60. A proper case for a writ of error, and not of *mandamus*. *People v. Judges of Oneida*, 21 Wend., 22. Nor to avoid the effects of a final judgment. *State v. Bowan*, 6 Ala., 511. Nor even though there be no other remedy, and a party has to seek redress by application to the Legislature for relief. *Fowle v. State*, 3 Ha., 207.

Affidavit on which the alternate *mandamus* was granted, not to be used upon the return, except to show the nature of the application. 7 Wend., 474.

When Courts commit manifest error, or are guilty of an abuse of power, an action for damages will lie—they being answerable only. *Criminaliter*, *People v. Collins*, 19 Wend., 56.

Where a discretion is vested in an inferior tribunal, a *mandamus* will not lie. It is proper, only where some legal right has been refused or violated, and there is no other appropriate legal remedy. *People v. Superior Court*, N. Y., 5, Wend., 122, 125.

There can be, in the nature of things, no rule by which discretion can be precisely measured. *People v. Collins*, 19 Wend., 60; *People v. Judges of Oneida*, 18 Wend., 75; *Ex parte Benson*, 7 Cow., 362; *Ex parte Nelson*, 1 Cow., 422; 1 Denio, 679; *Estrandier's Case*; *People v. Judges of Dutchess*, 20 Wend., 659; *Ex parte Ostrander*, 1 Denio, 682; *Elkins v. Athearn*, 2 Denio, 192; *Redding v. Commonwealth*, 1 Jones, 200; *Ex parte Hoyt*, 13 Pet., 291; 10 Texas, 263; 6 Eng. Law and Eq., 373; 12 Barb., 117; 15 Ala., 740.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

This was an application for a *mandamus* to compel the District Court for the Fourth Judicial District, to enter a decree, directing the receiver appointed in the case of *Adams v. Woods & Haskell*, to pay the amount of the claim of petitioner, as allowed by the report of the referee. The material facts of the case are fully

stated in our opinion, delivered at the present term, in the matter of the intervention of T. A. Lynch and others.

From the facts stated, it will be seen that the *truth* of the allegations contained in the bill of intervention had to be determined by the judgment of the Court below; and that, for this reason, the case was remanded for further proceedings. Had this Court directed the Court below to enter a specified judgment, the case would have presented a different aspect. Upon whatever ground the Court below bases its decision, refusing the relief prayed for by the bill of intervention, it is only error, and the remedy is by appeal. Had that Court refused to confirm the report of the referee, the only remedy would have been by appeal. The judgment of this Court, at the July term, 1857, was not that the intervenors were *then* entitled to the relief demanded, but only that they were so entitled upon proof of their allegations. The District Court had, therefore, to exercise its discretion in granting or withholding the relief asked by the intervenors. The case made does not justify the remedy sought by *mandamus*, conceding that such a remedy is proper in a case where this Court directs the Court below to enter a specified judgment, and that Court refuses to do so. But whether *mandamus* would be the proper remedy in this latter case, we do not now decide.

The application must be denied.

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### BARRETT v. TEWKSBURY *et al.*

It is not in the power of a Court of Equity to compel a married woman to correct an insufficient acknowledgment to a deed, for which she and her husband have received the consideration. Her consent must be perfectly free. She can make no contract to bind herself, except in the manner prescribed by law. The provisions of the statute must be strictly pursued.

APPEAL from the District Court of the Fourth Judicial District.

The facts of this case appear in the opinion of the Court.

*William H. Clark* for Appellant.

1. There is no evidence of any agreement, by parol or otherwise, on the part of the wife of the appellant, and no competent and sufficient evidence establishing any such agreement on the part of the husband of appellant.

2. The contract or agreement set up, being for the conveyance of land, is within the Statute of Frauds of this State, and not being in writing must be void. The evidence is not sufficient to bring the contract within any of the exceptional cases of the

statute. Comp. Laws, chap. 47, §§ 6-8, p. 200; 2 Story's Eq. Jur., § 764, p. 81; § 766, p. 86.

3. An agreement of the wife, either with or without the assent of the husband, for the sale of her real estate, is absolutely void at law, and the Courts of Equity never enforce such a contract as against her. 2 Kent's Com., p. 156 (168.) Thayer v. Gould 1 Atkyn's R. 617; Woden v. Morris & Wife, 2 Green Ch. R., 65; Butter v. Buckingham, 5 Day's R., 492; Watrass v. Chalker, Conn. R., 224; Martin v. Devilly, 6 Ward, 9; Rowe v. Khole, 4 Cal. R., 285; Sempers & Cranner v. Ellen Sloan, Cal. R., 457.

4. The wife of appellant signed and delivered the deed prepared and furnished by the respondents, with which they expressed themselves satisfied; there being no misrepresentation or deceit, on the part of appellant, and it being purely a mistake in law, and not as to facts on the part of the appellant, equity can afford no relief. Story's Eq. Jur., §§ 110, 111, 137, and notes. Shortwell v. Murray, 1 John's Ch. R., 512; Lyon v. Richmond, 2 Johns. Ch. R., 51-60; Stows v. Barker, 6 Johns. Ch. R., 169; Dupre v. Thompson, 4 Barb S. C. R.; Langley v. Brown, 2 Atkyn's R., 202.

5. The decree cannot well be complied with, is no relief, and leaves everything, so far as title is concerned, in *statu quo*. The husband cannot now join or give his assent, so as to restore the old deed, and make that deed effectual under the statute concerning husband and wife. Helen Poole v. Francis Gerrard, Cal. R., Jany. T., 1856, p. 104.

From the nature of things, the husband of himself is not capable of making or bettering a title to the appellant, and equity will only decree a performance of what is capable of being performed. His signature or attempt to join now might throw a cloud on the wife's title which should not be encouraged, as married women and their rights to their separate property are peculiarly a subject of protection in an Equity Court.

6. In case of sale or contract for sale by husband of wife's land, equity can afford no remedy by decree against the husband, because his imprisonment on the decree would tend to force a conveyance from the wife, through sympathy, and could be effectual in no other way, and the wife's conveyance should be purely voluntary and unconstrained. Emery v. Ware, 8 Vesey Jr., 505, 16 Vesey Jr., 367; Howell v. George, 1 Madd. 9; Opinion of Sir Thomas Plummer, Davis v. Jones, 4 Bos. & Pull, 267; Frederick v. Coxwell, 3 Y. & Jerv., 514; Jane Hunter, 1 Edward, 1; Weed v. Terry, 2 Douglass, 344; Eddington v. Harper, 3 J. J. Marshall, 360; 2 Kent's Com., 7 Ed., 157 (169); 2 Strong's Eq. Jur., § 731 to 786, and notes; 1 Sugd. on Powers, 7 Ed., 269 to 271, (231 to 233.)

John McHenry for Respondent. No brief on file.

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Phelan v. Supervisors of San Francisco.

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BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant, Emily S. Tewksbury, was the owner of certain premises in the city of San Francisco, as her separate property. A sale of this property was negotiated by her husband with James Barrett, one of the plaintiffs. A warranty-deed, from Mrs. T. to Mrs. B., was drawn up by an attorney, and executed and acknowledged by Mrs. T. This deed was satisfactory to James Barrett and Jacob M. Tewksbury, who were in the office when it was drawn. All parties supposed the deed sufficient. The acknowledgment was not in the form required by statute. The purchase-money, three thousand dollars, was paid; afterwards, the defect was discovered, and defendant, Jacob M. Tewksbury, repeatedly promised to execute, with his wife, a quit-claim-deed, but as often deferred it, and finally refused. This bill was then filed to compel him to join in the separate deed of his wife, under date of June 21st, 1852. The Court below decreed that defendant, Jacob M. Tewksbury, join in the execution of the deed of Emily S. Tewksbury, and duly acknowledge the same before a proper officer. From this decree the defendants appealed.

The deed, not being properly acknowledged, is insufficient. It is not in the power of a Court of Equity to compel a married woman to correct an insufficient acknowledgment. Her consent must be perfectly free. She can make no contract to bind her, except in the manner prescribed by the law. The provisions of the statute must be strictly pursued. She must be examined separate and apart from her husband. Whether the husband must join in the deed, we do not now determine.

If we had the power to enforce mere moral obligations, we should compel the defendants to execute and deliver a good deed. It is a hard and unconscionable case; but we can give no relief.

The decree of the Court below is reversed, and the bill of plaintiffs dismissed.

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### PHELAN v. SUPERVISORS OF SAN FRANCISCO.

After reversal of an erroneous judgment, the parties in the Court below have the same rights which they originally had.

Therefore, when a final judgment on demurrer to the complaint sustaining the demurrer, was reversed, the plaintiff had the right to amend, on application to the Court below.

MOTION to amend the judgment *nunc pro tunc*.

Jo. G. Baldwin for Plaintiff.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This case was decided at the October Term, 1856, and the judgment of the Court below simply reversed. We are now asked to amend the judgment, *nunc pro tunc*, by ordering the case to be remanded, with leave to the plaintiff to amend his complaint.

In the case of *Stearns v. Aquirre* and others, April Term, 1857, we held that a simple judgment of reversal was not necessarily a bar, but that "after the reversal of an erroneous judgment the parties in the Court below have the same right that they originally had."

In this case the defendants demurred to the complaint, which demurrer was overruled, and the defendants refusing to answer, judgment final was taken against them. Upon appeal to this Court the judgment of the Court below was reversed. The effect of this reversal was simply to leave the parties where they stood before the judgment. If the plaintiff wished to amend his complaint, he could have applied to the Court below for leave to do so, in the same way that he could have done had that Court sustained the demurrer. The decision of this Court went only to the merits of the case as it was stated upon the face of the complaint. If a different case could be made out by the plaintiff, he should have applied for leave to amend. As to whether, under the circumstances, it be now too late to make such application in the Court below, we cannot, under this motion, determine. We cannot amend the judgment, for the reason that it does not require it.

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### THE PEOPLE v. AH TI.

The Appellate Court will not disturb a verdict when the testimony is conflicting, or when the credibility of witnesses must be passed upon.

APPEAL from the Court of Sessions of Nevada County.

The facts of this case appear in the opinion of the Court.

*Belden & Yant* for Appellant.

The principle that verdicts may be set aside in both civil and criminal cases, as against the evidence, is already well established, and we have, therefore, only to show that the case at bar comes within the rule prescribed by this Court. *White v. Prader*, Oct. T., 1856; *Patten v. Seale*, Oct. T., 1857; *Patton v. Corney*, Oct. T., 1857; *The People v. Benson*, July T., 1856.

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Sherman v. Rolberg.

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*Attorney-General for Respondent.*

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The defendant was convicted of grand larceny. The only error assigned is that the testimony did not justify the verdict.

The rule is well settled that where there is no legal testimony to sustain the verdict, it will be set aside; but where the testimony is conflicting, or where the credibility of witnesses must be passed upon, it is a matter solely for the jury to determine. In this case, we think the jury might have found the defendant guilty or not guilty, and the Court would not have been justified in granting a new trial.

Judgment affirmed.

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### SHERMAN v. ROLBERG.

Where a party appealed from a Justice's Court to a County Court, and the justice neglected to send up with the record the notice of appeal: *Held*, that it was error to refuse to allow appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal.

APPEAL from the County Court of Colusa County.

The facts of this case appear in the opinion of the Court.

*Crocker, McKune & Robinson*, for Appellant.

Where both parties appear on appeal in the County Court, no notice of appeal is necessary. *McLeran v. Shartzler*, 5 Cal. R., 70.

*L. Sanders* for Respondent.

There is nothing to show that the County Court had jurisdiction of the appeal; for the reason that the statement of the case does not show that notice of appeal was served upon respondent appealing from the judgment alleged to have been rendered on the fourth day of July, 1857. The notice served did not state the amount of the judgment appealed from.

This case differs from the case in the fifth volume of California Reports, relied on by appellants. In that case, the parties appeared to the action and argued a motion for a continuance. In this case, the respondent appeared specially as to the question of notice, and hence the County Court properly dismissed the appeal.

The notice of a judgment rendered on the fourth day of July is no notice, because no Court can judicially sit on that day.

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Fremont v. Merced Mining Company.

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BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Action before justice of the peace. Judgment for plaintiff. Appeal to the County Court, where the appeal was dismissed, and the judgment of the justice affirmed. Appeal by defendant to this Court.

The judgment was rendered in the Justice's Court, on the second day of July, 1857. Notice of the appeal was handed to the Justice on the sixth of July, and on the same day notice of appeal was served on the attorney of plaintiff. This notice described the parties to the suit and the justice before whom it was obtained, but stated that the appeal was taken from a judgment rendered on the fourth day of July. The notice given to the justice described the judgment correctly. The justice sent up a copy of his docket and the papers, except the notice. The appeal was taken on questions both of law and fact.

When the case was called in the County Court, both parties appeared, and each asked liberty to make a motion. The plaintiff's counsel was allowed to make his motion first, and moved to dismiss the appeal and affirm the judgment of the justice, for two reasons: first, there was no notice of appeal on file; second, there was no notice of appeal served on defendant.

The mistake in the date of the judgment, as stated in the notice of appeal which was served on respondent, was not material. The notice was sufficient. It was the duty of the justice to send up the notice of appeal received by him. Code, § 627. The County Court should have given the appellant the opportunity to move for an order compelling the justice to send it up. § 627.

The order of the County Court dismissing the appeal and affirming the judgment of the justice is reversed, and that Court will proceed to try the case anew.

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FREMONT v. MERCED MINING COMPANY.

When an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendants' giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal, but he cannot have a *mandamus* to compel the issuance of attachment for contempt.

MANDAMUS.

Application to this Court for a *mandamus* to compel the District Court to issue an attachment for contempt. The facts appear in the opinion of the Court.

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People v. Judge of Tenth Judicial District.

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*Heydenfeldt* for Plaintiff.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Application for *mandamus*. The plaintiff commenced his action in the District Court of the Thirteenth Judicial District, and upon his *ex parte* application, an order was made by the Judge granting an injunction restraining the defendant from working certain quartz-veins. After due service of the injunction, the defendant, without notice to the plaintiff, applied for a modification of the order, which was granted by the Judge, upon the filing of a bond by defendant in a sum specified. After the order was made modifying the order granting the injunction, the defendant went on to work the quartz-veins mentioned, and the plaintiff, upon the proper affidavit, made application to the Judge for an attachment for contempt. This application was refused, and the plaintiff now applies to this Court for a *mandamus* to compel the Judge of the Court below to issue the attachment, and hear the case of the alleged contempt.

The Judge very properly refused the application for the attachment. The order granting the injunction having been modified, there was no contempt committed. The Judge had a right to modify the order, under the provisions of section three hundred and thirty-four of the Practice Act. 8 How. Pr. R., 440. If the Judge erred in making the order, the remedy of the plaintiff was by appeal. § 347.

Application denied.

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### THE PEOPLE *ex rel.* JOHN GALVIN *v.* THE JUDGE OF THE TENTH JUDICIAL DISTRICT.

In an application for a *mandamus* to compel a District Judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the District Judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: *Held*, that the relator is not entitled to a jury to try the issue, under section four hundred and seventy-two of the Practice Act.

Courts of such extended jurisdiction and grave responsibility must, from the very nature of the case, be trusted as to the fidelity of their records, and their decision thereon is final and conclusive.

MANDAMUS.

This was an application to this Court for a writ of *mandamus*, against the Judge of the Tenth Judicial District, to compel him to sign a bill of exceptions.

*Rowe & Mott* for Plaintiff.

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People v. Judge of Tenth Judicial District.

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*Thos. H. Williams, Attorney-General, for Respondent.*

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Application for *mandamus*. The relator was convicted of murder in the first degree, and sentenced to be executed. From the judgment of the Court below, he appealed to this Court. He presented to the Judge of the District Court what he alleges was a true bill of exceptions, which the Judge refused to sign. The Judge, in his answer, states that he did sign a bill of exceptions which was, according to his best recollection and belief, correct; and he still believes the same to be correct and true in every particular; and that he could not conscientiously alter or change the same. The relator, under this state of the case, claims the right to have this issue of fact tried by a jury, under the provisions of the four hundred and seventy-second section of the Practice Act.

Under the Constitution of this State, this Court has appellate jurisdiction "in all criminal cases amounting to felony, on questions of *law alone*."

The proposed question is simply a question of fact and not of law. The Judge alleges he did sign a *true* bill of exceptions, and the relator traverses this allegation. How, then, can this Court, having only appellate jurisdiction on questions of law, proceed to try a disputed question of fact?

In answer to this view, it is substantially maintained by the counsel of the relator, that this Court is not asked to *try* the issue of fact, or to exercise any *original* jurisdiction, but simply to employ its superintending power to compel a true history of the proceedings of the Court below to be sent up to this Court. And as this Court could not say to the District Judge, "you must sign the particular bill of exceptions," the only remedy given the defendant, is that found in section four hundred and seventy-two, allowing a jury to try the issue of fact.

The real question presented is, whether the record of the District Court can be corrected by the verdict of a jury. The object of a bill of exceptions, as well stated by the counsel of the relator, "is to make that record which before was not record." The Judge having signed a bill of exceptions, it became a part of the record in the case, and the only effect of the verdict of the jury, if different, would be to correct the record.

The power to determine every issue between parties, must be placed somewhere. There must be an end of controversies, or the system must fail to accomplish the very object intended. The District Courts are Courts of original jurisdiction, of the highest order known to our Constitution. They are Courts of grave dignity, and are required to keep a record of all their proceedings; and after they have assumed to do so, can their rec-

ords be corrected by any other power known to our law? The proceedings are known to these Courts, because they take place in their presence. Can a jury be called in to decide as to what occurred in the presence of the Court? Juries are used as instruments, to determine facts unknown to the Courts. But a Court does not require the verdict of a jury to inform it of facts occurring in the presence of the Court itself. Courts of such extended jurisdiction and grave responsibility as the District Courts must, from the very nature of the case, be trusted as to the fidelity of their own records. It would destroy all confidence in the verity of the records of these Courts, were the rule once laid down that their truth could be questioned. We should soon be called upon to direct issues of fact to be tried by a jury, as to whether the statements settled by District Judges, in civil cases, contained the whole truth, or otherwise. Every criminal convicted of murder in the first degree, could readily procure a lengthened stay of execution, by raising an issue of fact with the District Judge.

It is true that the language of the four hundred and seventy-second section is general, and would seem to include all cases where there was an issue of fact raised by the return to the alternative writ. But this general language only applies to *proper cases*. It could not have been the intention of the Legislature to give such an extraordinary power to juries as that claimed by the relator.

The relator may be without any judicial remedy. But this is the case with persons who are convicted by the verdict of a jury, when innocent. If the alleged error in the proceedings of the Court related to a mere legal question, not going so much to the merits of the case, then the relator is not so much injured as to justify a departure from the salutary principles of the law. But if, on the other hand, he was convicted when innocent, his remedy must be sought in the pardoning power of the Executive.

We consider the application in this case as novel, and without precedent. We, therefore, have no hesitation in denying it.

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### KRITZER v. MILLS *et al.*

Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defence that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest.

APPEAL from the District Court of the Fifth Judicial District.

This was a suit commenced on the following promissory note :

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Kritzer v. Mills.

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"Three months after date, I promise to pay to John Kritzer the sum of five hundred dollars, with interest, at two per cent. per month, from date. Value received.

(Signed.)

"JOHN MILLS.

"DAVID COUN.

"SHAW'S FLAT, October 8, 1856."

The defendant Coun, in his answer, admits the execution of the note, but alleges that he signed it as surety, and that plaintiff knew that fact at the time of the execution of the note. He also avers that he was entitled to notice of the non-payment, and that plaintiff did not use diligence, etc., to collect the note from defendant Mills.

On the trial, the defendant Coun offered parol evidence to prove the facts set up in his answer, and the Court allowed the same to go to the jury.

The Court instructed the jury as follows: "If the jury believe from the testimony that defendant Coun executed the note as security, and for the accommodation of defendant Mills; and that the plaintiff, Kritzer, knew the same at the time of execution, and that defendant Coun did not have due notice of demand and non-payment, they must find for the defendant." To which instruction, plaintiff excepted.

*Heslep, Platt, and Dorsey, for Appellants.*

The Court below erred in admitting testimony tending to show that respondent, David Coun, was surety in the note sued on.

1. Because the contract on which the suit is founded is perfect and complete, and the admission of such testimony tended to change the character of the contract, or create a new contract. 1 Green., chap. XV, §§ 275, 276, pp. 351, 352. Parol evidence is inadmissible, to vary the terms of a written contract. Lennard v. Vischer, 2 Cal., 37.

2. The Court erred in the instructions given to the jury—

*First*—Because the note explained itself, and though he was only surety on the note, his contract as an original promissor was not thereby changed. 1 Story on Prom. Notes; Humphry v. Crane and Yale, 5 Cal., 173.

*Second*—Because, if only a surety, the contract was that of a promissor, and this case is not aided by the cases of Lawrence et al. v. Lightstone et al., 4 Cal., 277; for in that case Lawrence was a guarantor, therefore, his liability was secondary. So, in the case of Riggs v. Waldo, 2 Cal. In the case, Bryan v. Berry, 6 Cal., 394, the question was upon the authority of the agent, who signed the note for the principal, whilst his authority only extended to signing as surety.

*Hunter & McNeil for Respondents.*

The note, sued on, is written in the singular number, but signed by both defendants.

Parol evidence, under exception, was admitted to show that defendant Coun signed the note as surety, and that fact was known to Kritzer.

The evidence did not tend to alter or vary the terms of the note, but merely to show the relation of the parties, and hence the exceptions were properly overruled by the Court. 13 Mass., 131.

When one of two promissors annex the word "surety" to his signature, the description does not alter the legal effect of the contract, but merely indicates the relation in which the parties stand to each other, and notice of such relation to the holder. But the fact of such relation and notice, if to the holder, may be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact, and rebut a presumption. 21 Pick., 195.

This Court has heretofore recognized the principle here contended for, doing away with all nice distinctions, and fixing the liability of endorser or surety without regard to where his signature is written, upon the common sense principle, that when his liability is secondary, that fact is known to the holder, he is entitled to all the rights of an endorser.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action upon a promissory note executed by defendants. The defence set up by Coun, was, that he was only a surety for Mills; that plaintiff neglected to bring suit in due time, and that no notice of demand and protest was given. Mere neglect to sue is no defence. (5 Cal., 173.) The defendant Coun was not entitled to notice. The note was signed "John Mills," "David Coun."

There was nothing upon the face of the note to show that Coun was a surety, and this case does not fall within the doctrine laid down in the cases of *Riggs v. Waldo*, 2 Cal. R., 485; *Lightstone v. Lawrence*, 4 Cal., 277; and *Bryan v. Berry*, July T., 1856.

Judgment reversed, and cause remanded, and the Court below will render judgment for plaintiff.

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ORTMAN *et al.* v. DIXON *et al.*

MANDAMUS.

This was an application to this Court for a writ of *mandamus*

against William T. Barbour, Judge of the Tenth Judicial District, to compel him as such Judge, to issue his writ of attachment against the defendants, for contempt in disobeying an injunction issued by said District Court. This is an agreed case.

*T. B. Reardon* for Plaintiffs.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Application for *mandamus* to the Judge of the Yuba District Court.

This was a chancery suit, in which a decree was rendered for plaintiffs, perpetually enjoining the defendants from diverting the waters of Mill Creek. Pending a motion for a new trial, the defendants violated the injunction, and plaintiffs applied for an attachment against them for contempt of Court, which was refused upon the ground that the pending of the motion operated as a suspension of the injunction.

We think that this was error. Let a peremptory *mandamus* issue.

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ALVIN ADAMS v. WOODS & HASKELL.—T. A. LYNCH  
*et al.*, *Intervenors*.

The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the Court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution.

It is only in cases of insolvency, that the equitable rule for a *pro rata* distribution will apply, and then as of necessity. If the firm be solvent, a creditor whose claim is due cannot be placed on a par with others whose claims are not yet due, or who have been less diligent in securing claims already due.

Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to attachment at any time before a final decree of dissolution and distribution.

APPEAL from the District Court of the Fourth Judicial District.

The facts in this case are the same as those in the case of *Adams v. Woods & Haskell*, decided at the July Term, 1857, of this Court. (7 Cal. R.) By stipulation of counsel, the record in that case is made a part of the statement in this.

*J. A. McDougall* for Appellant.

In this case, a decree was rendered distributing the moneys to all the creditors *pro rata*, regardless of the claim of the intervenors.

The intervenors brought this case, by writ of error, to this

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Adams v. Woods & Haskell.

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Court, when the whole question of intervenor's rights, as attachment and judgment-creditors, was discussed and the law settled by the Court. *Adams v. Haskell*, July Term, 1857.

The Court below makes the *same decree* from which the intervenors had before appealed, thus ignoring the ruling of the Supreme Court.

Intervenors insist that they are entitled to an order of distribution to the attaching-creditors in the order of the priority of their respective liens.

*Shafter & Park* for Respondents.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

In the matter of the intervention of T. A. Lynch and others. This case, in its different aspects, has been repeatedly before this Court. We had supposed, that in the different opinions heretofore delivered, principles had been laid down, by the legitimate application of which, all questions arising in the Court below could have been decided. As, however, our views have not been correctly understood, we find it necessary to re-state them more explicitly and more in detail.

The case of these intervenors was before us in July, 1857. The orders of the District Court, made in December, 1856, and up to the fifth of January, 1857, were before us, on writ of error. The order, directing a *pro rata* distribution, made May 5th, 1856, and the order refusing to stay proceedings of April 28th, 1856, were before us on appeal. These cases were argued and submitted together. The intervenors placed their right upon two grounds; first, fraud on the part of the copartners, in bringing the suit; second, priority by virtue of intervenors' attachments. As stated in the opinion of the late Chief Justice, delivered at the July term, 1857, "the Court below permitted the intervention to be filed, but refused to stay proceedings in the case or afford the parties any affirmative relief, but directed the receiver to proceed and distribute the money in his hands *pro rata* among the creditors; from which orders and rulings the intervenors have appealed." The appeal having been taken from *all* the orders and rulings, and the reversal being general, necessarily applied to all. As stated in the opinion, the "case made involved two propositions; first, whether a creditor of the firm could pursue his remedy at law, after the bill was filed and the receiver appointed, but before a decree of dissolution; and second, whether a creditor could attack the whole proceeding, on the ground of fraud and collusion between the parties." Both of which propositions we decided in the affirmative. When the verified bill of intervention was filed, the Court below, conceding its allegations to be true, decided that the intervenors

were not entitled to the affirmative relief demanded. Upon appeal to this Court, we decided that, if these allegations were true, either as to the fraud charged, or as to the attachments, then they were entitled to priority of payment out of the fund in the hands of the receiver. The case was remanded, for the purpose of ascertaining the truth of those allegations. The Court below appointed a referee to ascertain and report the facts. The referee reported the facts to the Court, showing the names of the attaching-creditors; the amounts of the various writs of attachment and the judgments rendered thereon, and the time when they were served upon Cohen, the receiver. This report was confirmed by the Court "without prejudice to such further consideration as to its effect, as might be given it upon final decree." The Court afterwards rendered a decree that the fund be distributed *pro rata* among the creditors, and denying the right of the intervenors to any priority in the distribution of the fund, and the intervenors appealed.

In the opinion delivered by the Chief Justice, reference is made to the views expressed in my opinion in the case of Adams & Co. v. Hackett & Casserly, January Term, 1857, and those views expressly adopted. In this opinion it was said: "From these cases, it seems to be settled that, until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the partnership assets among the creditors, they are not prevented from resorting to adverse proceedings; and that, when a creditor does resort to such proceedings, he may thereby gain a preference over those creditors who are less diligent."

And in the opinion of the Chief Justice, it was said: "From this it must necessarily result, that the intervenors having acquired a lien upon the property of Adams & Co., by attachment and judgment, prior to the decree of dissolution, are entitled to the fruits of their judgment, and must be first paid."

In the opinion delivered by the Chief Justice, it was held, that "the possession of the receiver was only of such a character as the Court could invest him with in the case made by the bill." The bill of Adams did not allege either a prior *dissolution*, or the *insolvency* of the firm. It prayed for a dissolution; an injunction; an accounting; the appointment of a receiver; and the application of the assets to the copartnership debts. Conceding the facts stated in the bill to have been *all* true, as alleged, the case made by it did not authorize a *pro rata* distribution. It is only in cases of *insolvency* that this equitable rule can apply. If the firm be *solvent*, then all the creditors can be paid in full; and there can be no ground for delaying those creditors whose claims are already due, and putting them on a par with those whose claims are not yet due, and requiring all to wait for a distribu-

tion. It is only in cases of necessity that equity will step in to delay creditors.

The bill not having alleged the insolvency of the firm, there could be no proof made of that fact. The allegations and proofs must correspond, and the allegations must *precede* the proofs. The Court would not travel out of the record and out of the case, *as made*, to ascertain facts not alleged, admitted, or denied. Woods & Haskell had not answered at the time the attachments were served. No creditor, *at that time*, had filed a bill of intervention for himself, and on behalf of all the creditors, alleging the insolvency of the firm, and praying a *pro rata* distribution of the assets in the hands of the receiver. And had such a bill been *afterwards* filed, it could not have destroyed the priority of liens then existing.

The bill was filed by Adams, as appears from its allegations, simply for his own protection. He moved because the creditors had not moved. He wished a dissolution to avoid future responsibility, and he asked the injunction, and the appointment of a receiver, for the purpose of taking from Woods and Haskell the power to create further debts, and the power to misapply the assets to their own use. He wished the assets applied to the payment of the partnership debts, because he was individually responsible for them, and this application of the partnership assets would thus diminish his individual liability. It was matter of indifference to him whether the assets were applied *pro rata*, or otherwise. The end contemplated by him would be equally attained in either event. But, conceding that he desired a *pro rata* distribution, he did not make out a proper case by his bill.

The bill having been filed by Adams, against his copartners, for his own protection, the case was under his control until a decree of dissolution. Of course, the defendants Woods and Haskell had the right to deny the allegations of the complaint; and then, unless these allegations were sustained by proof, the bill must have been dismissed. The Court could not compel Adams to prove his allegations. And the Court would not decree a dissolution without cause. Who could tell, at the time the attachments were served, that there would be a decree of dissolution? It was hardly probable that Woods and Haskell would admit the fraud charged. And if no decree of dissolution was made, no *pro rata* distribution could be had, under the case as made by the bill. Unless the defendants Woods and Haskell had alleged the insolvency of the firm, in their answer, or some creditor had filed a bill of intervention, alleging that fact, the Court would not inquire into it. Now, were the creditors to stand idly by and wait the uncertain result of this suit between the partners? No one could tell when or how it would terminate.

The proposition, that creditors could be delayed by such proceedings, never can, in my view, be reconciled with the equity or the philosophy of the law.

In the case reported in 1 Hoff. Ch. Rep., 524, Smith filed his bill against Waring & Robinson, "alleging certain acts of misconduct, stating a dissolution to have been made by consent, and praying an account, an injunction, and a receiver." In that case the bill was not denied; and it was even *there* held that the creditors were not prevented from pursuing their remedies at law and obtaining a preference.

"I consider it, therefore, perfectly clear," said the assistant Vice-Chancellor, "that no creditor was prevented, by the bill of Smith, from proceeding at law against the partners, and obtaining an adverse judgment, which, if followed up by a creditor's bill in this Court, would give him a preference. But the right of a copartner to give a confession of a judgment, appears to me not established." (Page 530.)

In the elaborate opinion of the learned Judge of the Fourth District Court, (a printed copy of which is sent up, as a part of his return to the alternative *mandamus*.) certain well-established principles are stated, and from them conclusions drawn, that, in our view, do not follow.

It is true, that a receiver is an officer of the Court, and that the property in his hands is in the custody of the law; but it is equally true that *he holds it for whoever can make out a title to it*. It is also true, that the custody of this fund cannot be changed without the order of the Court by which the appointment was made; but it is equally true, that the service of the attachment does not change the custody of the fund. So it is true that an action cannot be brought against the receiver, without leave of the Court; but it is equally true, that the service of an attachment is not the bringing of an action.

When personal property of the defendant is in the possession, or under the control of another person, the attachment is levied by service of notice, and of a copy of the writ. (Code, § 126.) The person having such possession shall be liable to the plaintiff, unless the property be delivered to the sheriff. (Code, § 127.) The Court *may* compel such delivery, after an examination of the custodian on oath. (§ 128.)

But these provisions are not at all inconsistent with the view we have taken. The lien of the attachment commenced when the service was made upon the receiver, who had the property in his possession as receiver, and not in his capacity as an individual. He, as receiver, was responsible for the property to the attachment-creditors; but this responsibility could only be enforced through the Court from which his appointment emanated. True, the Court issuing the attachment has the power, in *proper cases*, to order the property to be delivered to the sheriff. But

this discretion must be soundly exercised. The property being already in the hands of the receiver, who had already given security for the faithful discharge of his duties, it would have been error in the Court issuing the attachment to have made such an order. The different principles of the law must be harmoniously applied to the circumstances of the particular case. The lien having attached to the property while in the hands of Cohen, followed it into the hands of Naglee, his successor. The provisions of sections one hundred and twenty-seven and one hundred and twenty-eight, were intended to secure the property *after* the lien has attached. If, therefore, this object is already secured, the Court from which the attachment issues will not proceed any further.

The rule that will not allow the receiver to be disturbed by the suits of others, applies to cases where either the possession of the property is sought to be changed, or where a title is set up by another party, adverse to the original title of the receiver. A *third* party, claiming the property, could not sue for it without the permission of the Court. The receiver cannot be compelled to defend in different Courts. But it was not the legal effect, nor the object of these proceedings by attachment, either to change the custody of the property, or to set up an adverse title to that of Adams & Co. The attachment-creditors admitted the title to be in Adams & Co. The liability of the receiver was not increased. He was only, *as before*, still liable to whomsoever could ultimately make title to the property.

"Where the receiver is in possession of property upon which a third person has a claim for rent, the proper course for the landlord is to apply to the Court, on notice to the receiver, for an order that the receiver pay the rent, or that the landlord be at liberty to proceed, by distress or otherwise, as he may be advised." (Edwards on Receivers, 128.)

The course pursued by the intervenors has been substantially the same. They first obtained a lien by attachment and ultimate judgment; and then, on notice to the receiver, sought a decree, directing him to pay them in the order of their several priorities. We can see in these proceedings no violation of established principles, and no invasion of the jurisdiction of the Court in which the suit of Adams v. Woods and Haskell was pending.

In reference to another point, decided by this Court at the July Term, 1857, it is proper to offer some further remarks. The act for the relief of insolvent debtors, provides that "no assignment of any insolvent debtor, otherwise than is provided in this act, shall be legal or binding upon creditors."

This language is clear, explicit, and restrictive. If Adams, Woods, and Haskell, had themselves made an assignment, it would not have been binding upon their creditors. But if the end prohibited by the statute could have been accomplished by

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People v. Wallace.

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the joint act of the copartners, or by the individual act of Adams alone, in instituting this suit, then all they had to do to defeat the purpose prohibited, was to change their *mode* of operations. The statute intended to defeat all assignments made by the *insolvent*. Now, whether this purpose be accomplished by the act of the *insolvent*, in one form or another, is immaterial. But we do not mean to say that the *creditors*, on their part, could not have filed a bill, and by that means procured a *pro rata* distribution.

There has been no conflict in the judgments made by this Court in this case. Different Justices of the Court have differed as to the reasons given. This is explained in the opinion of the Chief Justice, delivered in July last.

The decree of the Court below is reversed, and that Court will render a decree, directing the receiver to distribute the proceeds in his hands, and all such proceeds as may hereafter come into his hands, first to the several intervenors, in the order of the priority of their respective attachments, and then the remainder to the other creditors, *pro rata*.

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THE PEOPLE v. WALLACE.

An indictment must contain a statement of the facts constituting the offence charged against the defendant. The defects of an indictment are not cured by a verdict. In an indictment for murder, a statement of the manner of the death, and the means by which it was effected, is indispensable. It is also necessary to state the time and place, as well of the infliction of the wound, as of the death of the party, in order to fix the venue, and that it may appear on the record that the deceased died within a year and a day after receiving the injury.

APPEAL from the District Court of the Fifteenth Judicial District, County of Butte.

William Wallace was indicted and tried for the crime of murder. The material averment in the indictment is as follows:

"The said William Wallace, on or about the eighteenth day of June, A. D. 1857, at, etc., and before the finding of this indictment, did, willfully, unlawfully, feloniously, and with malice aforethought, shoot, bruise, and wound, one James Fox, upon the body of the said James Fox, with a pistol, then and there, in the hands of the said William Wallace, and by thus shooting, bruising, and wounding, with pistol, as aforesaid, the said William Wallace did, then and there willfully, unlawfully, feloniously, and with malice aforethought, kill and murder the said James Fox, against the form of the statute," etc.

The defendant was found guilty of murder in the first degree.

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Defendant's counsel thereupon moved the Court to arrest the judgment, for the following reasons :

1. Because there is no allegation in the indictment that the said James Fox, alleged to be murdered by the said William Wallace, is dead.

2. Because there is no allegation in said indictment that the said James Fox died from the effects of the wound ; nor does it appear that he died within a year and a day from the time the wound was inflicted.

3. Because the indictment does not show upon what part of the body the wound was given, nor whether said wound was mortal.

There were other grounds upon which the motion in arrest of judgment was based, but as they were not taken into consideration by the Appellate Court, it is deemed unnecessary to state them.

*William H. Rhodes* for Appellant.

The Court erred in overruling the motion in arrest of judgment :

1. Because there is no allegation in the indictment, that James Fox, alleged to have been murdered, is dead. The indictment must show the death of the murdered man. Whart. Cr. L., p. 268 ; 1 Russell Cr. Law, 562 ; *People v. Arro*, April Term, 1856.

2. Because there is no allegation in said indictment that the deceased died from the effects of the wound received from W. Wallace. Arch. Cr. Pl., 487 ; Whart. Cr. L., 292.

3. Because the said indictment does not show upon what part of the body of deceased the wound was inflicted, nor does it allege that the same was mortal. Whart. Cr. L., 271 ; Arch. Cr. Pl., 485 ; *Dias v. The State*, 7 Black., p. 22.

*Thomas H. Williams*, Attorney-General, for the People.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The indictment in this case does not contain a statement of the facts constituting the offence charged against the defendant ; and therefore no conviction could properly be had under it. In the *People v. Arro*, 6 Cal., 207, we held that the rule of the common law, requiring a statement of the acts constituting the offence charged to be set out in the indictment, was not changed by our statute, as the necessity of such statement was directly recognized by the one hundred and thirty-seventh section of the act.

Every offence consists of certain facts and circumstances ; and the general rule is, that all the facts and circumstances contained in the definition of the offence, whether by a rule of the com-

mon law or statute, must be stated in the indictment. (1 Whart. Cr. Plea and Prac., pp. 85, 86.) And in indictments for murder, a statement of the manner of the death, and the means by which it was effected, is indispensable. (1 Russell, 560; 2 Hale, P. C., 186.) It is also necessary to state the time and place, as well of the infliction of the wound, as of the death of the party, in order to fix the venue, and that it may appear of record that the deceased died within a year and a day from the infliction of the injury. (1 Russell, 563.)

The reasons for these requirements are: first, that the defendant may be fully apprised of the charges against him, so that he may be prepared for his defence; second, that the record may be a bar to a future prosecution for the same offence; and third, that it should appear from the facts patent on the record, that a distinct, legally defined crime has been committed, in order that the Court may be justified in awarding judgment according to law. The defects in the indictment are not cured by verdict, but may be taken advantage of by motion in arrest of judgment.

It follows, that the Court erred in refusing to arrest the judgment on defendant's motion.

The judgment is reversed, and the cause remanded, with directions that the indictment be set aside, and the case submitted for the action of another grand jury.

### THE PEOPLE v. FRANKLIN COX.

The decisions in the cases of *The People v. Wallace* and *The People v. Lloyd* applied.

APPEAL from the District Court of the Fifteenth Judicial District, County of Butte.

The defendant was indicted for the crime of manslaughter. The indictment charges that "one Franklin Cox, on or about the fourteenth day of June, A. D., 1857, at, etc., before the finding of this indictment, did unlawfully, willfully, and feloniously, strike, penetrate, wound, and shoot, one Stephen Lannigan, to wit: in and upon the body of the said Stephen Lannigan, with a pistol, then and there in the hands of the said Franklin Cox, and by said striking, penetrating, wounding, and shooting, of the said Stephen Lannigan, the said Franklin Cox did then and there unlawfully, willfully, and feloniously, kill the said Stephen Lannigan, against the form of the statute," etc. The defendant was tried by a jury and found guilty. The defendant moved the Court for a new trial, and also for arrest of judgment, but as none of the grounds upon which said motions were made, are those upon

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which the case turned in this Court, it is deemed unnecessary to state them. Defendant appealed.

*William H. Rhodes* for Appellant.

*The Attorney-General* for the People.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

Judgment reversed, and cause remanded, on authority of *People v. Wallace*, and *People v. Lloyd*, decided at the present term.

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### CURTIS v. RICHARDS & VANTINE.

There are but two forms in which a defendant can controvert the allegations of a verified complaint; first, positively, when the facts are within his personal knowledge, and second, upon information and belief, when they are not.

In no case can the allegation of a verified complaint be controverted by a denial of sufficient knowledge or information upon the subject, to form a belief.

The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issue.

An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite.

Whether the Superior Court of the city of San Francisco had jurisdiction to render a judgment over two hundred dollars, is no longer an open question: *Held*, that it had such jurisdiction on the principle of *stare decisis*.

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The complaint in this case alleges that, on the fifteenth day of January, one thousand eight hundred and fifty-six, the plaintiff obtained a judgment in the Superior Court of San Francisco, against David Scannell, sheriff, for the sum of two thousand three hundred and forty-five dollars; that Scannell appealed from said judgment to the Supreme Court, and that Richards & Vantine executed, on behalf of said Scannell, on the eighth day of March, one thousand eight hundred and fifty-six, an undertaking joint and several, in the sum of four thousand eight hundred dollars, whereby they and each of them undertook and promised to the effect "that the said Scannell should pay the said judgment so appealed from, if the same, or any part thereof, should be affirmed, and if affirmed only in part, then the amount as to which said judgment should be affirmed, and all damages and costs which should be awarded against the said appellant on said appeal."

The complaint further alleges that on the twentieth day of De-

ember, one thousand eight hundred and fifty-six, the Supreme Court affirmed said judgment, with costs; that the *remittitur* from the Supreme Court was issued and filed in the Superior Court December thirty-first, one thousand eight hundred and fifty-six; that on the sixth day of January, one thousand eight hundred and fifty-seven, execution issued on said judgment of the Superior Court, which execution was, on the ninth day of January, one thousand eight hundred and fifty-seven, returned "unsatisfied." That no part of said judgment has been paid, and that the same is still due, of all of which defendants had notice. The complaint is verified.

The defendants, in their answer, say "that as to the allegation in the said complaint, that proceedings had been taken in the Superior Court, they have not sufficient knowledge or information to form a belief whether any such proceedings were had, or if had, whether the same were regular, or whether any judgment was rendered therein," etc. "They therefore deny the same."

"Defendants further say that they have no knowledge or information sufficient to form a belief whether proceedings were taken on appeal," etc. "They therefore deny the same."

"Defendants make a denial in the same language as to the issuing and filing the *remittitur*, and also denied the indebtedness.

To this answer the plaintiff demurred, the Court sustained the demurrer, and gave judgment for plaintiff. From which judgment defendants appealed to this Court.

*John Currey* for Appellant.

1. The Court called and designated "The Superior Court of the city of San Francisco," had no jurisdiction to render a judgment for two thousand two hundred and fifty dollars.

The Constitution of this State declares that "the District Courts shall have original jurisdiction in law and equity, in all case where the amount in dispute exceeds two hundred dollars."

This clause of the Constitution has received a judicial construction by this Court. *Caulfield v. Hudson*, 3 Cal. R., 389; *Zander v. Coe*, 5 Cal R., 230; *Mayer v. Kalkman*, 6 Cal. R., 582; *People v. Hughes*, 1 Cal R., 342.

2. It is averred that the defendants signed the undertaking as sureties only, the principal not signing. The surety is made liable upon the consideration which exists between the principal and the promisee or obligee, and that consideration must appear on the face of the instrument. *Ex Parte Brooks*, 7 Conn., 428; *Richardson v. Craig*, 1 Denio, 666; *The Republic of Mexico v. Anangois*, 11 Howard P. R., 6.

In all these cases it is held that undertakings on appeal, under statutes similar to ours, must be signed by the appellant.

In *Newton v. Hagarnan*, 1 Brown R., 95, a similar rule is

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held under a Pennsylvania act. *Day v. Pickett*, 4 Munford, 104; *Roberts v. Holliday*, 4 Mun., 323; *Hardaldy v. Biles*, 1 Smedes & Marshall, 757.

3. The appellant being the original obligor and principal in the undertaking, should have been made a party, though it should be held that he need not sign the undertaking.

When judgment is obtained against principal and sureties, in payment thereof by sureties they are entitled to the benefit of that judgment. They are entitled to be in a position to enforce the judgment as against the principal, without another action, which they cannot do unless the principal is made a party to the action against them.

The answer is sufficient.

1. The answer expressly charges that there was no lawful consideration.

The complaint has not shown what the consideration was, so that the Court could ascertain upon inspection of the pleadings, as to the correctness of this issue. If the consideration was the staying of execution, then it was competent for the defendants to show that execution was not stayed.

2. The answer expressly asserts that the instrument upon which the action is brought is void.

3. The denials in the answer are sufficient to put the whole complaint at issue. It denies the indebtedness as charged. 2 Code R., 67; 5 How. P. R., 321; *Snyder v. White*, 6 How. P. R., 321; *Temple v. Murray*, ib., 330; *Sherman v. Bushnell*, 7 How. P. R., 171.

The demurrer, we think, should have been overruled, as well for insufficiency of plaintiff's complaint, as also for the sufficiency of the defendants' answer.

*L. D. Simons and E. B. Mastick*, for Respondent.

The answer does not deny either positively, or on information and belief, a single material fact or allegation in the plaintiff's complaint.

The complaint being verified, the defendants were bound to deny or admit, either positively or on information and belief, the allegations in the complaint. Practice Act, § 46, p. 18.

The act as originally passed, § 46, Laws of 1851, p. 57, provided that the defendant might answer that he had not any knowledge sufficient to form a belief.

The New York code contains a similar provision. 4 Ed. Voorhees Code, § 149, p. 189.

The Legislature of this State amended this section so as to require that the defendant should either admit or deny on information or belief. By this change the Legislature intended to require the defendant to give his belief, or make some inqui-

ries and obtain such information so as to either deny or admit from such information or belief.

It has been held in New York, where the party executed the instrument, he was bound to either admit or deny positively. *Lent v. Lent*, 8 How. P. R., 28.

And where he could easily ascertain, and had the means of informing himself, he must admit or deny from information and belief. *Hance v. Remming*, 1 Code R., N. S., 204; *Wesson v. Judd*, 1 Abbott P. R., 254.

The denial, in the answer, of the indebtedness alleged in the complaint, is insufficient in this: It does not deny any fact or material allegation, making out the cause of action, and consequently does not put in issue any fact to be tried.

For material allegation, see Practice Act, § 66.

An answer denying indebtedness is bad. *Pierson v. Cooly*, 1 Code R., 91; *Gaushee v. Leavitt*, 5 Cal. R., 160; *McMurray et al. v. Gifford*, 5 How. P. R., 14; *Baker v. Bailey*, 16 Barb., 57.

The appellants insist that the undertaking is void, and that they are not liable.

1. Because it was not executed by the appellant.

2. Because the judgment and proceedings in the Superior Court are void.

As to the first objection, no person could complain but the respondent. The undertaking is good as against the sureties.

The undertaking is good for the purpose of the appeal, and is in compliance with the statute. *Bellinger v. Gardiner*, 12 How. P. R., 381; *Shaw v. Tobias*, 3 Comstock, 188.

As to the second objection, the defendants, by entering into the undertaking, admitted the validity of the process and proceedings, and are estopped from setting up any irregularity or want of jurisdiction. *Mattoon et al. v. Eder*, 6 Cal. R.; *Steven v. Sornberger*, 24 Wend., 275; *Steven v. Sornberger*, 19 Wend., 121; *Crisman v. Mathews*, 1 Scam., 148; *Trimble v. The State*, 4 Black., 435.

It is not necessary, in any case, to allege or state facts showing that the Court had jurisdiction under our system of pleading. Prac. Act., 22, § 59.

As to the fourth point of appellants, that there is no averment in the complaint that the defendants signed as sureties, etc., respondent says, they are the original makers and principals, so far as the plaintiff is concerned, and must be so regarded. Their agreement is not merely a guarantee that Scannell will pay, but that they will pay themselves.

In the case cited in 7 Cowen's Rep., the statute expressly required the party to execute, and all the cases cited by appellants, with the exception of 11 Howard, were decisions made under statutes essentially different from ours.

In the following cases it was held that such an undertaking

was good under a statute precisely in the words of our own. *Billinger v. Gardner*, 12 How. P. R., 381; *Shaw v. Tobias*, 3 Cow., 188; *Thompson v. Blanchard*, 3 Cow., 335; — *v. Levy*, 12 Barb., 612.

The statute enters into and forms a part of the undertaking. *The People v. Carpenter et al.*, above cited; *Thompson v. Blanchard*, 3 Cow. R., 335.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

This is an action upon an undertaking executed by the defendants, as sureties, on an appeal from a judgment recovered by the plaintiff, in the Superior Court of the city of San Francisco. To the answer the plaintiff demurred. The demurrer was sustained, and judgment rendered for the plaintiff, from which the defendants appeal, and contend: first, that the complaint is defective in substance, and that, upon demurrer, judgment should be rendered against the party committing the first error, if the defect be one of substance; second, that the answer is sufficient to raise an issue; third, that the undertaking was void, in not being executed by the appellant as well as the sureties; and fourth, that the Superior Court of the city of San Francisco had no jurisdiction to render the judgment appealed from, which was for two thousand two hundred and fifty dollars.

It is unnecessary to determine whether, upon a demurrer under our system of practice, judgment should be given against the party committing the first error, when the defect is one of substance, as we think the objection of the appellant to the complaint, that it does not aver a good and sufficient consideration for the undertaking, is untenable. The allegation that the undertaking was executed for the purpose of perfecting the appeal and staying the execution of the judgment, followed by the allegation as to the hearing and determination of the appeal by the Supreme Court, brings the case within the principle of the decision in *Pulmer v. Melvin*, (6 California R., 651.) In that case, the undertaking was executed for the purpose of releasing property from attachment, and the complaint was held defective in not alleging that the property attached was released upon the execution and delivery of the undertaking. It did not appear that any action was taken on the undertaking after it was given. In the present case, no such defect exists in the complaint. The proceedings on the appeal show subsequent action on the undertaking; and its amount was sufficient, under the statute, to render the appeal effectual and to stay the execution of the judgment.

The answer was clearly demurrable. The complaint is verified, and the answer does not deny any of its material allegations, either positively or upon information and belief. There

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are but two forms in which a defendant can controvert the allegations of a verified complaint, so as to raise an issue: first, positively, when the facts are within his own personal knowledge; and second, upon information and belief, when the facts are not within his own personal knowledge. (Practice Act, § 46.)

These forms cannot be indiscriminately used. If the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively; and a denial upon information and belief, will be treated as an evasion. Thus, for example, in reference to instruments of writing alleged in a complaint to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description or copy in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. (Practice Act, § 446.) If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information and belief.

In no case, can an allegation of the complaint be controverted by a denial of *sufficient* knowledge or information upon the subject to form a belief. By the forty-sixth section of the Practice Act, as originally passed in 1851, it was provided, that an allegation of the complaint might be controverted by a denial "of any knowledge thereof sufficient to form a belief." In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts, upon the existence of which they did not hesitate to act in other matters. In 1854, the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case. The complaint alleges the recovery of a certain judgment in the Superior Court. The defendants executed an undertaking on appeal, reciting this judgment, and containing the usual covenant for its payment by the appellant, and damages and costs in case of affirmance by the Supreme Court, and yet, in their answer, they aver that "they have not *sufficient* knowledge or information to form a belief" whether any such judgment was rendered.

The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows, as a conclusion of law, raises no issue.

An undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. He is already bound by the judgment, and no purpose could be served by his joining with the sureties.

The statute does not require it, but seems to have been drawn expressly to cover all cases where, from absence or disability, the appellant could not unite in the undertaking. The statute provides, that it shall be executed *on the part* of the appellant; not *by* him, but by the sureties. (Practice Act, §§ 348, 349.)

Whether the Superior Court of the city of San Francisco had jurisdiction under the Constitution to render a judgment over two hundred dollars, is not at this day an open question. On the principle of *stare decisis*, we must hold that the Court possessed the jurisdiction, under the Constitution, to render the judgment in question.

Judgment affirmed.

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### MINOR *et al.* v. THE CITY OF SAN FRANCISCO.

For the points decided in this case, see the case of Joseph Woods v. The City of San Francisco, 4 Cal. R., 190.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The complaint in this case alleges that the city of San Francisco was the owner and proprietor of Pacific-street Wharf; that on the eighth day of July, William Webster purchased the said wharf at sheriff's sale, under an execution in favor of Peter Smith, and against the said city, for the sum of \$5,000; that on the 18th day of March, 1851, the sheriff executed a deed therefor, which said deed was duly recorded; that subsequently, the said Webster sold his interest in said property to the plaintiffs, and that William Hooper, John Middleton, Henry Haight, D. J. Talant, and William A. Lent, claim to hold the said property by virtue of a deed of trust from the Commissioners of the Funded Debt of San Francisco in trust for the said city, and receive the rents, issues and profits, for the use and benefit of said city, and that they continue to hold the same from the plaintiffs, who are entitled to the possession thereof. Complaint prays for a decree of Court against the defendants for the possession of the premises.

To this complaint the defendants filed a demurrer, on the ground that it did not contain facts sufficient to constitute a cause of action. Defendants had judgment, and plaintiffs appealed.

*Baldwin and Osborn* for Appellants.

The Sinking Fund Commissioners claimed only by virtue of the ordinances and acts of the city of San Francisco. They

claimed the property of the city, and hold it under that claim, and by virtue of the trusteeship created by the city.

The city had possession of Pacific Wharf before the deed to the Sinking Fund Commissioners. The Sinking Fund Commissioners leased the wharf to Roberts & West, on the thirteenth of February, one thousand eight hundred and fifty-one; lessees to build wharf, and to pay ten per cent. of gross proceeds, and the wharf, at the end of the lease, to revert to the city. Lease expired March thirteenth, one thousand eight hundred and fifty-six.

On the twenty-fifth of March, one thousand eight hundred and fifty-one, judgment, *Smith v. The City*; tenth of March, execution levied; fourteenth, judgment recorded; March twenty-sixth, one thousand eight hundred and fifty-one, Water-Lot Bill was passed, fixing permanent water-front, and giving lands inside, to the city, (which did not include the wharf.) May first, one thousand eight hundred and fifty-one, act authorizing city to build wharves at the end of streets to a distance of six hundred feet from the water front. May first, one thousand eight hundred and fifty one, establishing Board of Commissioners of Funded Debt of the city, and directing conveyance to them of lands, etc., deeded to Commissioners of Sinking Fund; June nineteenth, one thousand eight hundred and fifty-one, deed in pursuance of act.

July eighth, one thousand eight hundred and fifty-one, sheriff's sale to our predecessor, of Pacific Wharf.

May first, one thousand eight hundred and fifty-one, act confirming and ratifying the lease to Roberts & West; but not waiving or impairing any lien or judgment. See Acts App., p. 1.

But one question arises:

Did this wharf pass by the sheriff's sale?

This question is to be determined by two things: What is the nature of this property? And what sort of interest did the city have in it? That, upon principle, a wharf may be sold as much as a house, or, if we regard it as personalty, as the materials which make the house, would seem to be clear enough. That it is a tangible thing, subject to levy and sale, is clear. It is no objection to say that the wharf is the property of a corporation, not even if it were so associated with the business of the corporation, as that the corporation could not exist without it.

Nor is it a part of the franchise, though it may be useful in carrying out the purposes of the franchise. So are the steamships of the corporation plying our oceans or rivers. So are bridges and ferry-boats. So are our railroad stations and railroad cars. It has been held that the iron rails, the bed of the road of a corporation, may be levied on and sold—indeed the road itself. The question was decided by the Supreme Court of North Carolina, in *State v. Rives*, 5 Iredell, 297. The masterly

judgment of Judge Ruffin, places the case upon such impregnable grounds, that we may safely rest upon his opinion.

In *Hunt v. Meason*, 4 Watts., 346, it was held that a bridge was real estate and might be sold under execution. See the reasoning of the Court in that case.

So it has been held that a ferry on the Ohio River is real estate, and descendible to the heirs. 2 J. J. Marshall, 224.

And the Supreme Court of Alabama held, in the case of *Lewis v. The Intendant*, etc., of Gainesville, the same principle. See that case for a full description of the nature of such a property; and also the cases cited in that case. 7 Ala. R.

2 Bouvier's L. D., title, Wharf, 649: "Wharf is a space of ground, artificially prepared for the reception of merchandise, from a ship or vessel, so as to promote the convenient loading and discharge of such vessel."

If this is not real estate, what is?

The Supreme Court of New York have given (in effect) their sanction to the same doctrine. *Boreel v. City of New York*, 2 Sandford, 552.

The recent case of *Shepherd et al. v. Covington Drawbridge Co.*, by Judge McLean, in the U. S. Circuit Court, also establishes the same principle.

This wharf is "real property." We have shown that it is descendible and dowable and vendible, as real estate. It comes, indeed, within the very definition of real estate. It is certainly not less of the realty than a right of fishery, which is real estate. See above cases. Certainly not less than a ferry—nor a bridge. *Ib.*

The definition is thus given of real estate: "Whenever a perpetual inheritance is granted, as here, which arises out of land, or is in any degree connected with it, or, as is emphatically expressed by Lord Coke, is exercisable within it, it is that sort of property which the law denominates real property." 4 Watts, 346, *supra*.

A wharf is thus defined by the Supreme Court of Massachusetts, in 6 Mass., *supra*: "A structure erected on a shore, below high-water mark, and sometimes extending into the channel, for the laying vessels alongside, to load or unload, and on which stores are often erected, for the reception of cargoes."

The California statute, in relation to executions, is, probably, the broadest and most comprehensive in the Union. By section one hundred and eighty-four of the Practice Act of 1850, it is provided, that "all the real estate, not exempted by law, whereof the defendant, or any person for his use, was seized on the day of the rendition of the judgment, or at any time thereafter, shall be liable to be seized and sold upon execution." § 217. "All property, real and personal, of the judgment-debtor, shall be liable to execution." If, then, a wharf is real estate, or if it be

"property," it passed; and it would be a bold thing to say, that a bridge worth \$20,000, or a ferry, or a wharf of the same or other value, was not "property," and that in a will or a deed it would not pass under that comprehensive designation. There is nothing in reason to exclude the right of taking toll on a bridge or a wharf, from the common incidents of property, more than the tolls themselves when taken. See the following cases, showing that franchises of this sort are alienable. 7 Smedes & M., 378.

There might be some plausibility in the idea that a wharf could not be sold, if, connected with it, was a franchise granted by the government, and which devolved certain personal duties upon the grantee which were made obligatory upon him; for it might then be said, that the government could not exact the duty, and suffer that which is necessary to its discharge, to be taken away.

But that is not this case; for, on the contrary, it has leased (and doubtless might sell) this very property.

If we regard the franchise of taking toll as an incorporeal hereditament, it is still a tenement. 2 Blackstone, 17; 4 ib., 401. It is capable of assignment and may pass by deed or grant. 4 Johns. R., 81; 3 Kent, 402.

In this case, the right is in the nature of a necessary use of the corpus of the property, and would pass as appurtenant to the wharf or to the land. It is not personal to the holder. So held by the Court of E. & A. of Miss., in *Townsend v. Blewitt*, 5. How., 508, in the case of a bridge-franchise granted by the Legislature. From its nature, the right to use the wharf—for toll or otherwise—was, if not a mere incident to the property, at least an easement appurtenant to the land, and passes by deed with it. *Coke Lit.*, 307-127; 3 Kent, 433-428.

Looking to the objects of the Legislature, and the intents and words of the act, further illustrated by the other legislation in connection with the subject, there can be no doubt that this was not a mere license, but a grant. It does not differ from the authority to build a bridge over a river, It is in consideration of public convenience, and looks to the erection of permanent and valuable improvements. It has been held that this authorization is a grant and not a mere reversible license. 3 Cushing, 58.

When, therefore, the city, mediately or immediately, exercised this right of building a wharf, not only the structure, but the land over which it was built, became at once the property of the city. It might have, possibly, still remained subject, in the hands of the State, to its eminent domain for the protection of navigation; but only subject as property otherwise obtained.

It is not material, perhaps, whether the wharf is the mere structure or the land on which the structure stands and neces-

sary for using it. We may concede that land will not generally pass as appurtenant to land; but the rule is not universal, and where the intent is plain, land may pass as appurtenant to a wharf, where the land is of no use except as auxiliary, or for the purposes of the wharf. Thus in Massachusetts, it was held in *Doane v. Broadstreet*, 6 Mass. R., 332, that flats necessary to a wharf, and usually occupied with it, may pass as appurtenant. But in this case the land known as Pacific Wharf, was levied on and sold; the structure was only on a part of this land, but the whole of this land was the wharf-land, that is, the land set apart and appropriated for this wharf.

But we have shown, that the city was in possession, either by herself or from herself, or those claiming under her and acknowledging her title; and the mere possession is a title which may be sold. 9 Cowen, 233. Neither the defendant in execution, nor any one holding under him, can set up against the plaintiff in execution, or a purchaser under him, an outstanding title, nor deny that the defendant has title. 2 Porter, 480; 10 Johns., 323; 1 Johns. Cases, 153; 1 Johns. R., 44; 3 Caines R., 188; Ala., 331; 12 Ala., 18; 10 Ala., 254; 11 S. & M., 327; 8 Dana, 194; 7 Cowen, 717; 4 Johns., 211; 3 Wash. C. C. R., 545.

These cases show that the defendant in execution can show nothing against the purchaser; he is as much estopped by the sheriff's deed, as he would be by his own: and, if by an executory contract with the defendant, another acquires possession of land, sold as defendant's, he is as much bound as the defendant himself; more especially if, as in this case, the person in possession holds the same title for the use of the defendant, or as his tenant or trustee.

It follows, from this view, that the city of San Francisco cannot set up title against this execution-purchaser; and that the fund commissioners, holding by the same title, could not set it up either. See 4 Johns., 211.

The remaining difficulty, if we have been thus far successful, arises from the decision of this Court, in the case of *Woods v. The City of San Francisco*, 4 Cal., 193.

Upon a strict examination of this case, it will be found that neither the facts nor the principles of that case apply to this. A principal question there, was, as to the right to divert the street on which the wharf was, to other uses; and the Court decided that it was not competent for the Legislature or the city to do this.

The argument of counsel, and the opinion of the Court, both put the case upon entirely different grounds from those here,—except that the counsel there took the position, rather too broadly, that, when a sheriff sells land under an execution, against the will, or without the privity or consent of the defendant, the latter will not be estopped to show he had no right—and 4 J. J.

Marshall, 585; 1 Dana, 359; 15 Mass., 470, are cited to sustain this doctrine. But we apprehend this doctrine cannot be maintained. The Kentucky cases go on the ground that the Kentucky statute—which exempts equities, etc., is different from the New York statute, under which, that Court admits, decisions have been made to the contrary. Here the statute is quite as broad, indeed broader, than the New York statute.

It was, undoubtedly, the intention of the statute of California to put the deed of the sheriff on the same footing as the deed of the defendant—and this is the sense of the rule: that the sheriff, being the agent of the defendant, conveyed the interest of the defendant, with the same effect as if the defendant made the deed. This is the ground Judge Washington took in *Cooper's Lessee v. Galbraith*, 3 Wash. C. C. R., 545. "The sheriff stands in the situation of the attorney of the party appointed by law to sell and convey, and his deeds stands on the same footing with the deed of the party himself." I can find no such case as 15 Mass., 470, at all relating to the point. 4 Dana asserts the same doctrine as Marshall.

But we submit that these are overborne, not only by the reason of the rule, but by an immense preponderance of authority the other way. See *Tillinghast's Adams*, 301; 2 Greenl. Ev., § 662, and cases in notes.

Finally and especially:

The main and decisive difference between this case and the case of Woods is, that, at the time of the act of the confirmation of lease, viz.: first May, 1851, the site of the Pacific Wharf was outside of the water-front of the city; the act of twenty-sixth March, 1851, did *not*, therefore, convey to the city this wharf. It belonged, as we showed before, to the State, when the State ratified and confirmed the use made of it. The lease of the Sinking Fund Commissioners, was not a nullity, therefore, unless any lease is a nullity, which does not carry to the lessee the property in it; but it lacked only the assent of the owner of the property to make it a good lease, and it got that consent by the act of ratification by the State.

By section four of act of March 26th, 1851, (Acts of 1851, p. 307,) the boundary-line of the city—the water-front—shall be and remain a permanent water-front of said city; the authorities of which shall keep free and clear from all obstructions whatever, the space beyond said line to the distance of five hundred yards therefrom. This shows that no street could be made outside of said line.

This Court never meant to hold that a reversionary interest—that is to say, the fee of property, may not be sold on execution, especially under our statute. That, if a man rents out his land, the land cannot be sold for the debts of the owner; for, if this is

*Hunt v. His Creditors.*

the law, all a man in debt has to do, is to keep his premises rented. See 8 Dana, 195.

Nor can it be pretended that a wharf is a street. It may be, but so may a bridge or a sea-wall. There is nothing in the nature of a wharf which makes it a street, any more than there is in a street which makes it a wharf.

The whole principle of the case of *Woods v. The City*, and every consideration that entered into that case to make up the opinion, opposes—to say the least, they do not favor, the view which we have combated; the facts are not the same; the reasoning is not the same and, we confidently submit, that the law is not the same in that case and in ours.

*Fletcher M. Haight for Respondents.*

This case is within the case of *Woods v. The City of San Francisco et al.*, reported in 4 Cal., 190.

Pacific street is extended into the bay beyond the water-front, as alleged, two hundred feet. This does not become private property by extending the street. The city limit is far beyond this extension, and was, at the time of sale. Laws of 1851, p. 387.

The city was authorized to construct wharves east of the water-line ceded by the water-lot bill, and prescribe the wharfage. Laws of 1851, p. 111.

The purchase was of Pacific-street Wharf, which extends into the bay, by permission of the Legislature.

We are unable to see that this case can be distinguished in principle from the case in 4 Cal. R.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The questions raised in this case are, in all essential particulars, the same as those decided in the case of *Woods v. The City*, (4 Cal., 190.) The learned counsel for plaintiff has sought to show a difference in the two cases; but has failed, in our judgment, to make it out. The reasons given, and the views expressed in the opinion of the Court in that case are entirely applicable to the facts of this case.

The judgment is therefore affirmed.

## HUNT v. HIS CREDITORS.

A party whose assets are forty per cent. above his liabilities cannot be considered insolvent.

APPEAL from the County Court of Siskiyou County.

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Dickinson v. Maguire.

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Samuel Hunt petitioned the County Court of Siskiyou county for a discharge from his debts, under the Insolvent Law, and in his petition states his liabilities to amount to one thousand dollars, and his assets to three thousand five hundred dollars. Pierson and Hulbert, creditors named in petitioner's schedule, filed their opposition to the discharge of the petitioner from his debts, on the ground that the facts set up in the petition did not constitute and make petitioner an insolvent debtor. The Court below sustained the objection of the creditors, and refused to discharge the petitioner. Petitioner appealed.

No briefs on file.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The facts stated in the complaint are not sufficient to entitle the party to his discharge under the Insolvent Act. The act provides for the discharge of insolvent debtors, and of no others. A party whose assets are forty per cent. above his liabilities cannot be considered insolvent.

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DICKINSON *et al.* v. MAGUIRE *et al.*

The action of forcible entry and detainer may be maintained in three cases: First, when the entry is forcible; second, when the entry is simply unlawful, and the detainer forcible; third, when the entry was lawful, and the holding-over forcible. But in all cases, there must be something of personal violence, either threatened or actual. In an unlawful entry, there must be some ingredient of fraud or willful wrong on the part of the party making the entry. The allegations of a complaint must be construed most strongly against the pleader. A complaint that alleges he is in possession in one place, and in another, avers that he is not, shows no cause of action.

APPEAL from the County Court of Calaveras County.

This was an action commenced in a Justice's Court to recover the possession of a quartz mining-claim. The complaint does not allege the value of the claim sued for; but avers that they are the legal owners, and that plaintiffs have legally held and occupied said mining quartz-claim uninterruptedly from the second day of October, A. D. 1856, down to the present time, to wit: the date hereof, with the exception of the unlawful acts of defendants hereinafter set forth, etc. The complaint then avers, "that defendants, well knowing, etc., wrongfully and illegally, without right or authority, or color of right or authority, unlawfully entered upon said premises," etc., and that they unlawfully detain the same from plaintiffs. Defendants, in their answer, deny the jurisdiction of the Justice's Court to try said case, be-

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Dickinson v. Maguire.

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cause the complaint does not aver the value of the claim. On the trial in the Justice's Court, both parties admitted the value of the claim to be four thousand dollars; and, on motion of defendant's counsel, the cause was dismissed by the Court for the want of jurisdiction. Plaintiffs appealed to the County Court, where, on trial, it was again admitted, that the claim was of the value of four thousand dollars; whereupon, defendants' counsel again moved the Court to dismiss the action for the want of jurisdiction. The Court overruled the motion to dismiss, and held that the action was under the Forcible Entry and Detainer Law, and as such, the Court had jurisdiction, and ordered the case back to the Justice's Court for trial. From which order, defendants appealed to this Court.

*Robinson & Beatty for Appellants.*

It is a well settled principle of law, that pleadings must be construed most strongly against the party pleading.

If the plaintiffs are the legal owners, and in the actual possession, etc., they cannot sue another to recover possession. If it is answered that the latter part of the complaint shows that defendants unlawfully entered, etc., it is enough for us to say, that the last allegation contradicts the first.

This is, in reality, a case to settle boundaries between the parties, a subject over which a Justice's Court has no jurisdiction.

*Smith & Hardy for Respondents.*

The action of forcible entry is one defined by statute, and the action may be maintained on three distinct grounds. First, "No person or persons shall make any entry into lands, tenements, or other possessions, but in cases where entry is given by law." Second, "And in such case, not with strong hand or multitude of people."

To these definitions may be added the third proposition, which is, where a party has lawfully entered, but unlawfully holds over. Then follows the penalty, "And if any person henceforth do to the contrary, he shall be fined."

Thus, it will be seen, that it is made a crime to enter into lands or other possessions, unless entry be given by law.

As to the first ground; *a fortiori*, all the provisions of the act are made to apply to such a case. Wood's Digest, 467, §§ 1, 2.

An entry without authority of law, is an unlawful entry, as contradistinguished from a forcible entry. *Atkinson v. Lester*, 1 Scam., 409.

In another case in Illinois, the Supreme Court of that State has held that "the action of forcible entry, etc., may be maintained in this state in four cases: first, where there has been an unlawful or illegal entry upon the possession of another."

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Dickinson v. Maguire.

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Whitaker v. Gautier, 3 Gill., 447; Revised Laws of Illinois, 1845, p. 256.

In the case of Frazier v. Hastler, 5 Cal., 159, the whole Court held, that if the "allegations of the complaint had only been of an unlawful entry, that the judgment could not have been sustained."

In the case of Moore & Moore v. Goslin, 5 Cal., 466, the Court said, "our Statute of Forcible Entries and Detainers provides a remedy for an unlawful entry, as well as a forcible entry."

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This case was lately decided, and upon a petition for a rehearing we are asked to review our decision.

The first section of the statute of this State, Wood's Digest, 467, prohibits—1. An unlawful entry into lands, tenements, or other possessions; And 2, A forcible entry when the right of entry exists. The same section then provides, in reference to both these cases, that "if any person do the contrary, and be thereof duly convicted, he shall be punished by fine." The second and third sections also clearly recognize the distinction between a forcible and unlawful entry.

The phrase, "other possessions," qualifies the preceding words, "lands and tenements." The possession must, therefore, be actual, peaceable, and exclusive, and not merely such possession as is deemed in law to follow the legal title. (*House v. Keiser*, October Term, 1857.)

It is clear that, under the provisions of the first, second and third sections, the entry may be simply unlawful and not forcible. What, then, is an unlawful entry? It is a peaceable entry, by fraud, or without color of title. It is not every peaceable entry, when the right of entry does not, in fact, exist, that constitutes an unlawful entry, within the meaning of the statute. There must be some ingredient of fraud or willful wrong on the part of the party making the entry. If we say that every entry is unlawful, when the party entering has not the strict legal right to do so, then we convert into a penal offence an act that may be done in good faith, and upon reasonable grounds of belief. A party may peaceably enter into the possession of premises to which he has a good *prima facie* right of entry, and honestly believes himself entitled so to enter. Yet if such an entry were deemed unlawful, as judged by our statute, the question, whether a party was guilty of a penal offence, would depend, not upon the intention, but solely upon the ultimate question of strict title.

If the first, second, and third sections, be construed by themselves, and without reference to other sections and the general spirit and purpose of the act, then it would follow that the

action for an unlawful entry could be maintained without the allegation or proof of any force whatever. But to ascertain the true intent and meaning of the Legislature, we must look to the whole statute, taken and construed as an entirety.

By the ninth section it is provided, that "on the trial the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of a forcible [or unlawful] entry, or was entitled to the possession of the premises at the time of a forcible holding-over."

This provision embraces all the cases intended by the statute; and the words "or unlawful," which are inserted in brackets, were no doubt accidentally omitted in drawing the bill. The case of a "forcible detainer" is clearly distinguished from the case of a "forcible holding-over."

Putting these different provisions together, and looking to the spirit and scope of the act, the action may be maintained in the following cases:

1. When the entry is forcible.
2. When the entry is simply unlawful and the detainer forcible.
3. When the entry was lawful and the holding-over forcible.

The thirteenth section declares what shall constitute a forcible holding-over.

As to what shall constitute a forcible detainer, it may be difficult to define in language so exact and certain as to exclude all room for reasonable doubt. The circumstances of different cases are so various as to make this impossible. But it may be stated in general terms that there must be something of personal violence, either threatened or actual. If, when the possession of the premises is demanded of the party, he, by word or act, look or gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this would be sufficient. It is not necessary for the claimant to wait until actual violence is resorted to.

It would seem that, in most cases, it would be no difficult matter before the commencement of the suit, to put the question as to whether the detainer be forcible or not, in a shape susceptible of easy proof. A clear and distinct demand of the possession, accompanied with an offer to take peaceable possession, by the claimant, would put the party making the unlawful entry at once in the wrong, if he refused peaceably to yield up the possession. There should be something to show that the claimant cannot obtain peaceable and easy redress by his own act, in such a case, before he can resort to this severe remedy. A party may, in some instances, enter into premises without color of title, and with no design to occupy adversely, and be willing to give up the possession when demanded. If the party making an unlawful

entry, will peaceably quit the premises when demanded, he will be only responsible for a trespass, and not for a forcible detainer.

There is, in the complaint in this case, no allegation of a forcible entry, or of a forcible detainer. The plaintiffs allege in the beginning of the complaint, that they are "the legal owners and in the actual possession of" the claim described. In a subsequent portion of the complaint, they allege that "they have legally held and occupied said mining quartz-claim, uninterruptedly, from the second day of October, A. D. 1856, down to the present time, with the exception of the wrongful acts of the defendants, hereinafter set forth." They then allege an unlawful entry and detainer. The allegations of the complaint must be construed most strongly against the pleader; and, as he alleges in one place, that he is in the actual possession of the premises, and in another, that he is not, the complaint shows no cause of action, even if we concede that an action for a merely unlawful entry and detainer, without any allegation or proof of a forcible detainer, could be supported.

In these actions, when the title becomes involved, either by the showing of the plaintiff or by the written and verified answer of the defendant, the justice must certify the pleadings to the District Court. (Code, §§ 5, 571, 581.) When the District Court obtains jurisdiction of the case, what relief will that Court administer? Will it depend upon the *merits* of the case as *shown upon the trial*? Suppose the defendant, by his answer, falsely sets up title. Can he, by his own wrong, avoid the penalties imposed by the act? These are important questions, which do not arise in this case, and about which we express no opinion.

The construction that we have given the act, would seem to be supported, not only by the language, the context, and the nature of the remedy provided, but also by the history of the action as originally adopted in England.

At common law, a man disseized of his lands, might lawfully regain the possession thereof by force. In doing this, he might be guilty of a breach of the peace, and be responsible criminally; but the party turned out by force, had no remedy to regain possession. "But this indulgence of the common law," says Hawkins, "having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbors, and also by force to retain their wrongful possessions, it was thought necessary, by many severe laws, to restrain all persons from the use of such violent methods of doing themselves justice." 2 Pleas of the Cr., ch. 64, p. 29.

The first act of Parliament was that of 2 Ed. III, which did not restore the party injured to his possession. The next was that of 5 Rich. II, ch. 7, § 6, which provides that "none from hence-

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Nowland v. Vaughn.

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forth make any entry into lands and tenements, but in case where entry is given by law; and in such case, not with strong hand, nor with multitude of people, but only in a peaceable manner. And if any man, from henceforth, do the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will."

It will be seen, that the first section of our statute, is almost a literal copy of this sixth section of the act of Parliament. But, as this statute did not provide any speedy remedy, the act of 15 Rich. II, ch. 2, was passed, which empowered the justices of the peace to enforce the previous act, in cases of *forcible entry*. Under the provisions of these several acts of Parliament, there was no remedy provided for a forcible detainer.

"But this statute," says Hawkins, "being likewise very defective in many respects, as in not giving any remedy against those who were guilty of a forcible detainer after a peaceful entry, nor even against those who were guilty of both a forcible entry and a forcible detainer, if they were removed before the coming of a justice of the peace; and in not giving the justices of the peace any power to restore the party injured by such force, to his possession," the statute of 8 Hen. VI, ch. 9, provides, that the injured party should be restored to his possession, either in the case of a forcible entry or a forcible detainer. The statute of 31 Eliz., ch. 11, made some further provisions, still recognizing the distinction between a forcible entry and a forcible detainer, and regarding both as offences. Some further provisions were made by the statute of 21 James, ch. 15.

It will be seen, that our statute is but a combination in one act of the substantial provisions found in the several acts of Parliament. By the British statutes, a mere unlawful entry or unlawful detainer, not accompanied by force, was not deemed an offence. Force was required in both cases.

Judgment reversed, and plaintiff's case dismissed.

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NOWLAND *et al.* v. VAUGHN *et al.*

WRIT OF ERROR to the District Court of the Fifth Judicial District, county of Amador.

*Samuel J. R. Handy* for Plaintiffs.

*Smith & Hardy* for Defendants.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

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Watson v. Robey.

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Writ of error dismissed, on the authority of *Haight v. Guy*, decided at the October Term, 1857.

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### WATSON v. ROBEY.

The object of the law, requiring the record of entry on lands under school-land warrants, was to give notice to subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void, as to a subsequent locator with actual notice.

This provision is like that of the act concerning conveyances, which requires the record of certain instruments. A party cannot forfeit his rights by a mistake which injures no one. A party cannot complain that he was injured, by a failure to record in the proper office, when he knew the fact without the record.

APPEAL from the District Court of the Eleventh Judicial District, County of Yolo.

The facts necessary to understand the points decided, appear in the opinion of the Court.

*Volney E. Howard* for Appellant.

The survey in this case, was made prior to the location by the defendant as a pre-emptor. The survey under the school warrant was the appropriation of the land. *Taylor v. Brown*, 5 Cranch, 234; *Pet. Cond. R.*, 235.

In Tennessee, a location takes effect from the time it was placed with the surveyor, and not from its place on the book of the entry taken. *Graham v. Dudley, Cooke*, 353.

It appears, from the evidence, that the survey was made December 18, 1855, and the pre-emption on the nineteenth day of January, 1856. Thus, it will be seen, that the survey under the school warrant, was a month elder in point of time.

The fifth section of the act for the disposal of lands granted to this State, by Congress, passed May 3d, 1852, secures to the locator, under the warrant and survey, "the right of possession to the land embraced within said survey, until such time as the government survey shall have been made." *Comp. Laws*, 869.

The sixth section of the last named act, has this provision: "that at the time of making such location, the first settler or owner of any improvements, situated on the tract proposed to be located, shall, in all cases, have the preference."

At the time of the survey, there was no settlement or improvement on the land in this case, and the first entry was made under the school warrant. The possession of the plaintiff was therefore prior.

The objection to the title under the school warrant, that they were not properly recorded, we do not recognize as tenable,

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The eleventh section of the act of May 3d, 1852, above cited, declares, that "the clerk of the County Court, shall make a record of all certificates of land located under the provisions of this act." Compiled Laws, 870.

In this case, the clerk signed the record as "recorder." In that county, the clerk is *ex officio* county recorder of deeds. The survey and warrants were filled in the proper office, with the proper officer, and registered in the proper book. The claimant cannot be prejudiced by the mistake of the clerk. *Wines v. Johnson*, Jan. T., 1857.

The registry does not confer the right under the school warrant. The whole object of the registry of the survey is, to give notice of the appropriation to subsequent locators. It is no more than an ordinary registry act. A subsequent purchase of the government, or entry at the land office, with a knowledge of a prior survey under a school warrant, would be a fraud *per se*, as much as a subsequent purchase, with knowledge of a prior unregistered deed or patent.

An actual entry and survey under a school warrant, is equivalent to the common law livery of seizin. 1 Sme. and Mar., 70; *Morris v. Byres*, 14 Tex., 278; as to notice of location, see 3 Metcalf, 405.

A school warrant, under the act of the Legislature, gave the right of possession. *Payne v. Treadwell*, 5 Cal., 310.

The act of Congress, of 1841, is a legislative grant, which passed the legal estate in fee. 2 How., 284; 2 *ibid*, 319; 2 Hammond, 119; 5 How. Miss. R., 383; Dunlap's P. S. Laws, 988, § 8.

The act of the Legislature of this State, authorizing a sale of school warrants, is a legislative grant. Comp. L., 868.

*Bowie & Griffith* for Respondents.

In order to entitle the plaintiff to recover, it is necessary for him to show a strict compliance with the requirements of the statute. The right conveyed by the warrant, is not an absolute title attaching immediately to the premises, but is simply a statutory right to the possession. They convey no title, as the title itself has not yet vested in the State, but still remains in the general government.

The statute provides that an entry of the location of school warrants shall be made in the office of the clerk of the County Court of the county in which such lands shall have been located. The entry and record was made in the office of the county recorder, and not in the office of the clerk. This is a non-compliance with the statute, and has been so held. *Wines v. Johnson*, Jan. T., 1857.

The offices of county clerk, and county recorder, are separate and distinct, and an act required to be performed by one is not sufficient if performed by the other.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action of ejectment. The plaintiff claimed under the location of school-land warrants, and the defendant under the provisions of the act of April 20th, 1852, prescribing the mode of maintaining and defending possessory actions on public lands in this State. In the Court below, the defendant had judgment, and the plaintiff appealed.

There is only one point in the case which it is necessary to decide.

The entry was made and recorded in the office of the county recorder, and not in the county clerk's office, as required by the fourth section of the act. (Wood's Digest, 515.) But there was proof given upon the trial tending to show that the defendant had actual notice of the location. The Court below instructed the jury, substantially, that the record was required, and without it the location was void.

We think this was error. The object of the record was solely to impart notice to subsequent locators and settlers; and when that object was attained, the purpose of the record was accomplished. This provision is like the provision of the act concerning conveyances, which requires the record of certain instruments. A party cannot forfeit his rights by a mistake that injures no one. The defendant cannot complain that he was injured by a failure to record in the proper office, when he knew the fact without the record.

Judgment reversed, and cause remanded for further proceedings.

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### THE PEOPLE v. EDWARD LLOYD.

It is unnecessary, in an indictment for murder, to state the degree of the offence. Under our statute, the essential averments of an indictment should be the same as at common law; every averment that is substantially necessary for the information of the defendant, so that he may know the particular circumstances of the charge alleged against him, and how to defend himself, is still necessary. It must be alleged that the wound was mortal, and that the party died of the wound.

APPEAL from the District Court of the Ninth Judicial District, County of Butte.

The facts necessary to understand the points decided appear in the opinion of the Court.

*J. H. McKune* for Appellant.

*Attorney-General* for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant was indicted for the crime of murder, convicted of manslaughter, and sentenced to imprisonment in the State-prison for a term of ten years. A motion was made for a new trial, and also in arrest of judgment, both of which were overruled, and the defendant appealed to this Court.

The learned counsel of defendant, in this Court, relies mainly upon alleged defects in the indictment. The indictment is very concise, and charges "that the defendant, before the finding of the indictment, in the county of Butte, did willfully, unlawfully, feloniously, and with malice aforethought, shoot, bruise, and wound, one Giles S. Thornton, to wit: in and upon the body of the said Giles S. Thornton, with a pistol, then and there in the hands of the said Edward Lloyd; and by thus shooting, bruising, and wounding, with a pistol, as aforesaid, the said Edward Lloyd did, then and there, willfully, and unlawfully, feloniously, and with malice aforethought, kill and murder the said Giles S. Thornton, against the form of the statute," etc.

It is objected, that the indictment only states that the defendant is accused of murder, without specifying the degree, whether first, second, third, or fourth. We think this objection not well taken.

It is also objected, that the indictment does not state upon what part of the body the wounds were inflicted, nor does it describe the breadth and depth of the wounds, nor that the pistol was loaded, nor that Giles S. Thornton is dead, or that he died of the wounds inflicted by the defendant.

The two hundred and thirty-seventh section of the act in reference to criminal practice, provides that the indictment, among other things, must contain "a statement of the acts constituting the offence, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." And by section two hundred and thirty-nine, it is also provided, that the indictment "must be direct and certain, as it regards the particular circumstances of the offence charged, when they are necessary to constitute a complete offence." So, by the provisions of section two hundred and forty-six, the offence must be "clearly and distinctly set forth in ordinary and concise language." Section two hundred and forty-seven provides, that "no indictment shall be deemed insufficient, by reason of any defect or imperfection in matters of form, which shall not tend to the prejudice of the defendant."

Putting these provisions together, it may be said that the substance of the indictment must still be the same as at common law; every averment that is substantially necessary for the information of the defendant, so that he may know the particular

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Polk & Hensley v. Coffin & Swain.

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circumstances of the charge alleged against him, and how to defend himself, is still required.

It must be alleged that the wound was *mortal*, and that the party died of the wound. (3 Ch. Cr. L., 735, 736, and the authorities there cited; 6 Cal. R., 207.)

For this reason, the judgment must be reversed, and the cause remanded for further proceedings.

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### POLK & HENSLEY v. COFFIN & SWAIN.

A stock-raiser is a competent witness to estimate the damage done to cattle by falling through a wharf.

Where the defendants held themselves out as public ferrymen: *Held*, that in an action against them for injuries to plaintiffs' cattle by the breaking of their wharf, error in the admission of proof of their ferry-license could not injure them, as they were responsible in any case.

A party in the actual possession of cattle at the time of injury, can maintain an action for an injury to them while in his possession.

The Court may allow, after the close of plaintiffs' evidence, the complaint to be amended by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties.

APPEAL from the District Court of the Seventh Judicial District, Contra Costa County.

The facts appear in the opinion of the Court.

*John Currey* for Appellants.

The Court allowed the plaintiff, Polk, to prove by his witness, John Hensley, his opinion of the damage, in money, done to the cattle, as the mode of ascertaining the amount of damages sustained by such plaintiff. To this mode of proving damages, the defendants' counsel objected. The objection was overruled, and defendants excepted.

There is nothing in the case, showing that this witness was competent to determine the amount of damages; this was the province of the jury, upon evidence of facts. By the ruling of the Court, the witness was substituted to the place of the jury, as to the damages sustained; and that, too, without disclosing the facts, if any existed, whereon his opinion was based. The following cases are respectfully referred to, as containing the rule of law on this subject: *Norman v. Wells*, 17 Wend., 161-164; *Sills v. Brown*, 9 Car. & Payne, 601; *The People v. Rector*, 19 Wend., 576; *Paige v. Hazard*, 5 Hill, 603.

The record of ordinances of the city of Benicia, and also the record of a ferry-license granted to Coffin & Swain, by the board of supervisors of Contra Costa county, were improperly admitted in evidence; because, first, it did not appear that the city of Be-

nia, or the supervisors of said county, had the power to grant a lease, or ferry-license. Second, it did not appear that the defendants, or either of them, ever applied for or consented to take such lease, or ferry-license. Third, such evidence was incompetent to charge, or in any manner affect the defendants in said action, and was irrelevant to the matters at issue between plaintiff and defendants. *Angell and Ames on Corp.*, §§ 631, 632.

The Court erred in refusing to grant the defendants' motion for a nonsuit, on the grounds specified, at the time of application.

The fourteenth section of the Practice Act requires, that of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants.

The evidence of the plaintiffs' principal witness disclosed, before the motion for a nonsuit was made, that the cattle belonged to J. W. Polk and Samuel J. Hensley.

The objection taken by the motion for a nonsuit to the maintenance of the action, the appellants submit, was valid, and required the Court to arrest the cause at that point.

The amendment allowed, after the testimony was entirely closed, the appellants insist, could not have cured the error of the denial of the motion for a nonsuit. If it could, then is it no longer a solecism, that one error may be cured by the commission of another more enormous than the first. *Ringgold v. Haven*, 1 Cal., 108; *Dalrymple v. Hanson*, *ib.*, 128; *Matin v. Brown*, *ib.*, 221.

The Court erred in allowing Samuel J. Hensley to be made a party plaintiff, after the testimony was closed.

The plaintiff, Polk, knew, before he commenced his action, as well as after the testimony was closed, that Hensley owned the cattle with him, and he was bound, at his peril, to commence the action in the names of the real parties in interest. It cannot be said that such an amendment was in furtherance of justice.

The course pursued by the Court, the appellants insist, was erroneous, for the following reasons: First, the counsel for plaintiff Polk had no authority from Hensley to make him a party plaintiff, and hence, if the verdict had been for the defendants, Hensley would not have been bound by it. Second, there was no issue joined between Polk and Hensley, as plaintiffs, and Coffin and Swain, as defendants. Third, the evidence, adduced on the trial, was in an action wherein Polk was sole plaintiff, and Coffin and Swain were defendants. Practice Act, § 390.

*Whitman & Wells* for Respondent.

No brief on file.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This action was commenced by Polk, as plaintiff, against the

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Polk & Hensley v. Coffin & Swain.

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defendants, to recover damages for injuries to plaintiff's cattle, occasioned by the breaking of the wharf of defendants, who were ferrymen at Benicia. After the close of the evidence for plaintiff, the Court permitted the complaint to be amended, by inserting the name of Hensley as co-plaintiff. Judgment was rendered for plaintiffs, and defendants appealed.

The appellants assign, as error: First, permitting a witness for the plaintiff to testify as to his estimate of the damage done to the cattle. Second, the admission of the ordinances of the city of Benicia, and the record of the defendants' ferry-license from Contra Costa county. Third, the refusal to nonsuit plaintiffs.

We do not think any of the points well taken.

The witness, Hensley, testified that his business was that of a stock-raiser, and, therefore, he was capable of forming an accurate judgment as to the actual injury sustained by the stock, and the consequent depreciation in their value.

As to the second point, if we admit that it was not shown that the city of Benicia, or the supervisors of Contra Costa, had power to grant a ferry-license, or that defendant had ever applied for or received a ferry-license, we cannot see how the defendants were injured by the admission of the evidence.

It was proven, that defendants held themselves out as public ferrymen, and were accustomed to convey persons and property across the straits, for hire; and, so far as the rights of plaintiffs were concerned, it was immaterial whether or not they were duly authorized to run such ferry. If they were assuming to act as ferrymen, without license, they could not take advantage of their own wrong to avoid the responsibility which attached to their calling.

The motion for a nonsuit was based upon a variance between the allegations of the complaint, and the evidence as to the ownership of the cattle. We think the variance was not fatal. The complaint charged that Polk was the owner of the cattle, whilst the evidence showed that they were owned jointly by Polk and Hensley. Polk was in the actual possession of the cattle at the time of the injury, and was entitled to maintain an action for any injury to them while in his possession.

It is always in the power of the Court to allow an amendment to a complaint, so it does not affect the substantial rights of the parties; and, except there is evidence of a gross abuse of discretion in the exercise of this power, it is no ground for the reversal of the judgment.

If defendants were surprised by the amendment, and found it necessary to adopt a different line of defence in consequence of it, they would have been entitled to a continuance, in order to prepare for their defence. But it does not appear that the

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merits of the case, or the liability of the defendants, were at all changed by the amendment.

Judgment affirmed, with ten per cent. damages and costs.

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### HUMPHREYS *et al.* v. McCALL *et al.*

Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz.: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia Ditch to them, plaintiffs, as alleged," etc.

Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, is presumptively based on information, he is not bound to deny positively, but only "according to his information and belief;" but in such case he must answer according to *both* his information and belief. The word "*belief*," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information.

Defendant can know what is *his* belief, and can therefore state it. This belief may be founded on the statement of others, not competent witnesses, and not under oath, etc. Yet, if the defendant has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony.

In an action for damages, for diversion of water of plaintiffs, where defendants plead the general issue, it is not competent for the defence to prove that a prior claim to the water exists in a third party. Such a defence should have been specially plead, and the third party made a party to the action.

APPEAL from the District Court of the Fifth Judicial District.

This was an action to recover damages for the diversion of water from the ditch of plaintiffs, and to enjoin defendants from the continuation thereof.

The facts of the case are as follows:

Plaintiffs allege that they are entitled to the waters of San Antonio Creek, to the extent of one hundred and eighty cubic inches, by virtue of the construction of a dam across said creek, and a ditch, known as the Georgia Ditch, for the purpose of the diversion of its waters, for mining purposes. Said dam and ditch were constructed, about the tenth day of July, 1852, by Thomas Cooper and others, who conveyed said ditch, on or about the tenth day of October, 1855, to Charles H. Everett, James A. Head, and James M. Dean, who, on the twenty-ninth day of October, 1855, conveyed said ditch to plaintiffs. There was no written evidence produced on trial, of any conveyance from Cooper to plaintiffs' grantors; though it was proved that a written conveyance was made and delivered, and its absence was not accounted for. Defendants, about the thirtieth day of October, 1855, constructed a dam across said creek, at a point above the dam of said plaintiffs, and turned the waters of the creek into the ditch of defendants, and thereby diverted the

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waters of said creek from the ditch of plaintiffs, to the extent of the capacity of their ditch.

Defendants allege that the ditch of plaintiffs was constructed for private purposes, and that its original capacity was much less than one hundred and eighty cubic inches, and that the quantity of water originally appropriated by plaintiffs' grantors has been continually furnished them, notwithstanding the dam and ditch of defendants.

On the trial, the defendants offered to show that Benson and Spencer had the elder and better right to the waters of said creek, by the erection of a mill, below the dam of the said "Georgia Ditch," and that Benson and Spencer were suing defendants, for the same diversion of the waters of said creek.

The Court below refused to receive evidence on this head; and the case being submitted to the jury, they found that plaintiffs were entitled to one hundred and eighty cubic inches of water, and five dollars damages.

Judgment was entered on the verdict, for restitution of one hundred and eighty cubic inches of water, and five dollars damages and costs of suit. From which judgment defendants appealed to this Court.

*Robinson & Beatty* for Appellants.

Assigned the following points of error of the Court below:

1. The Court erred in overruling defendants' motion for nonsuit.

2. The Court erred in allowing parol evidence of the contents of the deed from Cooper to plaintiffs' grantors.

3. The Court below erred in permitting evidence of conveyance from Everett, Head, and Dean, to the plaintiffs to go the jury.

4. The Court below erred in refusing to defendants the right to show that there was an elder and better right to the water than plaintiffs, and that if any diversion of said waters was made by defendants, they were responsible only to the holder of that elder right.

The Court below erred in refusing to allow defendants to show that the first locator or appropriator of the waters, Spencer and Benson, were alone entitled to bring the action for the diversion complained of, and that if any damage was done by the diversion by defendants, they were responsible to Spencer and Benson only.

6. The Court below erred in refusing to allow defendants to show the existence of the suit for the same diversion by Spencer and Benson against these defendants.

*Heydenfeldt* for Respondents.

The second assignment is not well taken, because the com-

plaint avers that Everett, Head, and Dean, were the owners and successors in interest of Cooper.

The answer does not deny this fact. The evidence admitted was therefore unnecessary to establish the right.

2. The third assignment is not well taken, because, the deed was the last evidence of the transfer of the right of Everett, Head, and Dean, to the plaintiffs.

3. The third, fourth, and fifth assignments, are not well taken, because—

1. No such defence is set up or relied on in the answer.

2. The subject matter is *res inter alios acta*.

3. The defence does not set up the rights of the third parties, nor pretend to claim under them.

4. The defence does not admit the rights of these third parties.

There is no denial in the answer of the conveyance from Cooper to Everett et al. The only denial is of the sale and transfer to the plaintiffs. That denial is insufficient. The answer says: "From want of information to enable them to admit." They might have knowledge of the fact from being present, and seeing the deed signed, and yet the answer would be true. So the answer is only inferential.

How much information would enable them to admit? They are left to be the judges of that, for they failed to state that they have no information on that subject.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover damages for the diversion of water from the ditch of plaintiffs, and to enjoin defendants from continuing the nuisance. The plaintiffs had judgment in the Court below, and the defendants appealed.

1. The first error assigned by defendants is, that the Court below erred in overruling defendants' motion for a nonsuit. This objection we think not well taken. The evidence was sufficient to go to a jury.

2. The second error assigned is, that the Court erred in permitting parol evidence of the contents of the deed from Cooper to plaintiffs' immediate grantors, without accounting for the non-production of the instrument. In answer to this objection, the counsel of plaintiffs insist that the fact was not denied in the answer. The complaint and answer were both verified. In the complaint it was alleged that Thomas Cooper and others constructed the ditch, and that "on the tenth day of October, 1855, and for a long time previous thereto, Charles H. Everett, John A. Head, and James M. Dean, were the owners and successors in interest of the said Thomas Cooper and others, of, in, and to, the said Georgia Ditch." This allegation of the complaint is

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met by the defendants, in their answer, by this denial: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia Ditch to them, the said plaintiffs, as alleged in their said complaint."

In case the complaint be verified, the answer must contain a specific denial to each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief; and every allegation not so denied, shall, for the purpose of the action, *be taken as true*. (§§ 46 and 65.)

The only consequence resulting from the failure of defendants to properly deny a particular allegation of the complaint, is, that the allegation shall be taken as true. No motion to set aside the answer is required; but it is held simply void, and raises no issue.

When the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer upon information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, of the defendant, is presumptively based upon information, he is not bound to deny, positively, but only "according to his information and belief." In this case, the transfer from Cooper was the act of a *third* party; and unless it had been expressly alleged in the complaint that defendants knew that fact of their own knowledge, they could only be required to answer according to information and belief. But the defendant, in such case, must answer according to *both* his information and belief. The answer in this case says nothing about the *belief* of the defendants. It does not deny that defendants had *any* information, but simply avers a want of information to enable them to *admit*, not believe, the alleged fact. The object of the statute is to sift the conscience of the defendant, and obtain from him *his belief*. He must answer according to his belief, whether that belief be founded upon sufficient or insufficient information. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information. There is a clear distinction between positive knowledge and mere belief, and they cannot both exist together.

The defendant can know what is *his* belief, and can, therefore, state it. This belief may be founded upon the statements of others, not competent witnesses, and not under oath, and not, therefore, legal testimony, to prove the fact in Court, if denied. Yet, if the defendant has formed a belief of the fact from this incompetent testimony, he must state it. In making out *his* answer, he cannot undertake to decide whether the information upon which his belief is founded was legal testimony, or otherwise. He must state facts only, and the fact of *his* belief is the only matter known to him. If permitted to judge as to the

legal competency of the information upon which his actual belief is founded, then the object of the statute, in requiring him to answer *according to his belief*, would be defeated.

The only object in requiring the defendant to state his belief, is to dispense with the necessity of proof, on the part of the plaintiff. If, then, he admits that he believes the fact to be true, the fact stands as confessed. The clear result of this provision of our statute is conceived to be this: that the defendant must state his actual belief, whether founded upon mere hearsay evidence, general report, or other information; and when he does so state it, he is precluded from controverting the alleged fact which he *believes*, but does not *know* to exist. The practical result is, that the plaintiff may establish the existence of a fact, not known to the defendant, by the defendant's mere belief, based upon incompetent evidence. The statute changes the law of evidence in favor of the plaintiff, and against the defendant. It permits the plaintiff to verify his complaint; and then the defendant is compelled to state his belief, as to facts he does not know to exist. And when those facts (unknown to the defendant) are alleged and sworn to by the plaintiff, upon his own knowledge, the defendant is compelled either to believe them to be true, or to believe the plaintiff guilty of perjury.

Under the construction we are compelled to give the statute, to make it practically operative, the answer contained no proper denial of the alleged fact. The rule is a hard one, but the remedy must be sought elsewhere. While the defendant is compelled to answer every material allegation in the complaint, the plaintiff is not required to answer new matter, set up by the defendant, but the same is deemed controverted, without any denial. But we must administer the law as we find it. This provision of our Practice Act would seem to be a fruitful source of moral, if not of legal perjury.

3. The third assignment of error depended upon the second, and is already disposed of.

4. The fourth, fifth, and sixth assignments of error, are substantially the same, and may be all considered together. The defendants offered to prove that there was an older and better right to the water, in Spencer and Benson, and that they had brought a suit against defendants, for the diversion of the same water. This proof was refused by the Court, and the defendants excepted.

This defence was not affirmatively set up in the answer. The plaintiffs, under the issues made by the pleadings, were only bound to establish a better right than the defendants. This they did, by proving a prior appropriation of the water by them. The simple denial, by the defendants, of all right in the plaintiffs, only put in issue the right of the plaintiffs to recover as against the defendants. The defendants, being in the actual

possession and use of the water, had a good *prima facie* right to it; but when the plaintiffs proved a prior possession and use, they overcame this *prima facie* case of defendants. The *prima facie* case made out by the plaintiffs was of exactly the same character as that of the defendants, but it was prior, in point of time, and, therefore, as to it, superior. If, then, the defendants wished to overcome the *prima facie* case of plaintiffs, by showing that they were not trespassers upon them, but upon an older and better right, if trespassers at all, they should have specially set up such matter, and made Spencer and Benson parties to the suit, by filing an answer in the nature of a cross-bill. A trespasser should not be held liable to pay the *damages* he has occasioned, except to the party rightfully entitled to them. But, if he wishes to avoid a double responsibility as to the damages, he must bring the proper parties before the Court. It may be that the holder of the true title may not wish to assert his right; and if he should not wish to assert his title, the defendant has no right to assert it for him. The failure to assert the paramount title must enure to the benefit of him who holds the *oldest prima facie title*. If any one acquires a title by adverse possession, it must be the party having the prior actual possession. The party having the prior actual possession is always entitled to recover the *possession* of the premises from the second possessor, when both claim only by possession, and the suit is only between the two parties.

Other points were alluded to in the oral argument before the Court, but cannot be noticed, because not stated among the points on file.

Judgment affirmed.

### CHASE v. STEEL *et al.*

The debts of a partnership must be discharged from the joint-property, before any portion of it can be applied to the individual debts of the partners.

The fact that a partner's interest is mortgaged for his individual debt, for the purchase-money of his share in the partnership, is immaterial. He can only mortgage that which he has, viz.: a share subject to partnership debts.

APPEAL from the District Court of the Fourteenth Judicial District.

The facts necessary to understand the points decided, appear in the opinion of the Court.

*McConnell & Niles* for Appellants.

The contract is between several members of the firm, not as

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partners, but as individuals. Their remedy was by action of covenant on the agreement.

Partners may sometimes sue each other at law, and this looks to us as one of the cases where it may be done. Collyer on Part., §§ 245, 246.

It appears that plaintiff and defendants Steel, Gould, and Tilden, are partners. Plaintiff and defendant Steel each owning one-third interest, and defendants Gould and Tilden one-third. It also appears, that there is due plaintiff, from the firm, the sum of \$4,580, and that defendant Porter holds two mortgages against the interest of defendants Gould and Tilden, which were given to secure the purchase-money of said Gould's and Tilden's interest in the firm.

At the time of Porter's sale to Gould and Tilden, there were no demands against the company.

The Court decreed a dissolution of the partnership, according to the prayer of the complaint, but further decreed, that one-third part of the proceeds of the sale be paid into Court, to abide its further order, upon the determination and adjustment of the priority of liens upon that portion of the property belonging to defendants Gould and Tilden, and that the remaining two-thirds of the proceeds of sale be applied to the payment of the \$4,580.

The error consisted in subjecting the share of the defendants Gould and Tilden to the satisfaction of Porter's mortgage, prior to the satisfaction of partnership debts.

A partner has no interest in the partnership stock, beyond the share remaining after the partnership debts are paid. *Pierce v. Jackson*, 6 Mass., 243; *Fiske v. Herrick*, ib., 271; *Holdwill v. Shackles*, 8 B. & C., 612-620; *Nicholl v. Mumford*, 4 John. Ch., 523; *Mechanics' Bank v. Goodwin*, 1 Halsted, 338.

Creditors by specialty stand upon the same footing, in this respect, as any other creditors. Collyer on Part., § 126.

The fact that Porter's mortgage was for the purchase-money of the interest of Gould and Tilden, and that there were no debts against the partnership at the time of the purchase, does not affect the operation of this rule.

The specific lien of partners attaches not only to the stock of property on hand, but to everything coming in during the continuance of the partnership, or after its determination. Collyer on Part., § 127; *Skipp v. Harwood*, 2 Swan., 586.

The sale to Gould and Tilden did not, in fact, convey any of the property of the firm to them. It only entitled them, in equity, to call upon Chase and Steel, for an account of whatever interest of Porter should be ascertained to exist. Story Equity Jurisp., § 677.

*W. M. Stewart* for Respondents.

The judgment of the Court should have been to the effect that,

on the sale of the partnership property, the proceeds be first applied to the payment of the costs of this action, and then to the satisfaction of plaintiff Chase's judgment, for \$4,580, and the surplus should then have been divided, equally, between Chase, Steel, and Porter, (mortgagee of Gould and Tilden,) until the said mortgage was paid, and then the surplus should be divided, *pro rata*, between Chase, Steel, Gould, and Tilden, members of the "Empire Mill Company;" for Gould and Tilden could only sell or mortgage their interest in the surplus, after the payment of the debts of the concern.

Collyer on Part., § 127; Receivers, etc., v. Goodwin, 1 Halsted Ch. R., 334; 1 Hilliard on Real Property, p. 7, § 22; 1 Story's Eq., 667; 6 Mass., 242; 2 John., 280; Nicholl v. Mumford, 4 John. Ch. R., 522; Sumner v. Hampton, 8 Ohio, 365; 3 Kent Com., 37, and note; Story on Part., §§ 93-99, and notes; 1 Waterman's Edn. on Injunctions, 53, 3, 55, 48, notes; Buchanan v. Sumner, 2 Barb. Ch. R., 165.

This is a chancery case, and this Court has repeatedly decided that they would, in a case like the present, enter the proper judgment. Grayson v. Gould, 4 Cal., 122.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action for a dissolution of a partnership and account.

From the record, it appears that plaintiff, under contract with the Empire Mill Company, furnished material and performed labor, in building a race and flume for their use, and that the company were indebted to him, on account of such labor and material, in the sum of \$4,580; that the Empire Mill Company was composed of plaintiff, and defendants Steel, Gould, and Tilden, plaintiff and Steel owning each one-third interest, and defendants Gould and Tilden owning one-third; that the interest of Gould and Tilden had been purchased from one Porter, and was mortgaged to him to secure the purchase-money.

The Court decreed a dissolution of the partnership, and a sale of the property; and that, after payment of costs, the proceeds of the two-third parts of the property, belonging to plaintiff and defendant Steel, should be applied to the payment of plaintiff's demand; and that the remaining one-third interest, belonging to defendants Gould and Tilden, be reserved for the future decision of the Court as to priority of liens.

This portion of the decree was erroneous. The debts of a partnership must be discharged from the joint-property, before any portion of it can be applied to the payment of the individual debts of the partners. "Until the affairs of a copartnership are wound up and settled, the claim of a partner is, strictly speaking, merely equitable; for, until then, no action can in

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general be maintained at law, by one partner against another," etc. *Williams v. Henshaw*, H. Peck, 79.

The fact that Porter held a mortgage on the interest of Gould and Tilden was immaterial; they could convey only such interest as they had, which was merely an undivided third of the property which should remain after the debts of the firm were discharged. "At common law, a partnership stock belongs to the partnership, and one partner has no interest in it but his share of what is remaining, after all partnership debts are paid, he also accounting for what he may owe to the firm."

Consequently all debts due from the joint-fund must first be discharged, before any partner can appropriate any part of it to his own use, or to the payment of any of his private debts; and a creditor to one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor, or on a seizure of the goods on execution. (6 Mass., 243; Coll. on Part., § 126.)

That portion of the decree which directed the plaintiff's claim to be satisfied out of the proceeds of the shares of Chase and Steel, is erroneous. But inasmuch as the case appears to have been fairly tried, and the judgment in other respects to be fully sustained by the facts, as disclosed by the record, it is not necessary that a new trial should be had.

Judgment reversed, and the Court below directed to enter a decree in conformity with this opinion.

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### CANEY v. SILVERTHORNE.

A party failing to give notice, in time, of his intention to move for a new trial, or to file his statement in time, waives his right to move for a new trial.

APPEAL from the District Court of the Fourth Judicial District.

The facts upon which this case turned, appear in the opinion of the Court.

*McDougall & Sharp* for Appellant.

*Shafter, Park & Shafter*, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant, having failed to give notice of his intention to move for a new trial, or to file his statement within the time

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 Jones v. Love.
 

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limited by the statute, lost his right to move for a new trial. (Practice Act, § 195.)

There is no statement on appeal; the statement for new trial not having been filed in time, is not properly a part of the record. We can only look at the judgment-roll; which, being regular on its face, judgment is affirmed, with costs.

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 JONES *et al.* v. LOVE *et al.*

The liability of a witness to either party, in case of a certain result of the suit, must be legal, and not moral, and the consequent interest present, certain, and vested, in order to exclude the witness.

Where a party is called as a witness by the other side, and, on his cross-examination, testifies to new matter, his opponent may be called on his own behalf, in rebuttal of this new matter.

When the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

The facts of this case appear in the opinion of the Court.

*C. A. Tuttle and Jos. A. Nunes* for Appellants.

The witness L. D. Paige was incompetent, on the ground of interest.

Practice Act, § 393; *Jones v. Post et al.*, 4 Cal., 14; *Griffin v. Alsop & Co.*, *ib.*, 406; *Shaw v. Davis*, 5 Cal., 466; *Palmer v. Tripp's Administrator*, 6 Cal., 82; *Finn v. Vallejo Street Wharf*, 7 Cal., Jan. T., 1857; *McCauley v. The York Mining Company*, 6 Cal., 80.

Where the event of a suit will render the witness liable, either to a third person or to the party himself, he is incompetent. 1 Green. Ev., § 393.

Paige's declaration to Jones and his other vendees, amounts to a warranty, as to the extent and dimensions of the claim.

Chitty on Con., 394, and notes 1 to 8, American ed.; 1 Green. Ev., 397, 398; *Roberts v. Morgan*, 2 Cohen, 438; *Chapman v. Murch*, 19 John., 290; *Cook v. Mosely*, 13 Wend., 277; *Osgood v. Lewis*, 2 Har. & Gil., 495; *Morrill v. Wallace*, 9 N. H., 111; *Beeman v. Buck*, 3 Ver., 53; *Moon v. McKinley*, 5 Cal., 471.

Taking depositions is in derogation of the common law, and every requirement of the statutes must be complied with.

*Dwinelle v. Holland*, Abb. Prac., 57; *Bradstreet v. Baldwin*, 11 Mass., 329; *Fleming v. Hollenbeck*, 7 Barb., 271; *McCann v. Beach*, 2 Cal., 25; *Dye v. Bailey*, *ib.*, 383; *Williams v. Chadbourne*, 6 Cal., 559.

It is not a legal or valid assumption that the defendants, by their appearance and cross-examination of the witnesses, waived any exceptions to which they were entitled, under the statute.

*Jackson v. Kent*, 7 Cohen, 59; *Ocean In. Co. v. Francis*, 2 Wend., 65; *Whitwell v. Barbier*, 7 Cal., Jan. T., 1857; *Gray v. Hawes et al.*, 8 Cal., Oct. T., 1857; *Leidesheimer v. Brown*, ib., Oct. T., 1857.

There was a notice for the examination of Dick Marley, but none for the examination of J. D. Marley. If, on notice to examine one witness, another may be substituted, the purpose of a cross-examination may be entirely defeated, and the adverse party taken by surprise. *Robinson v. Campbell*, 1 Overton, 296; *Brefogle v. Beckley*, 16 Sergt. & R., 264.

*J. E. Hale* for Respondent.

Paige was a competent witness; his interest was uncertain, indirect, and conditional. 1 Green. Ev., §§ 890, 894, 897; Practice Act, § 393.

All grounds for objection by appellants disappeared, when defendants appeared and exercised the right of cross-examination. This was a waiver of the objection of notice. *McLeran v. Shartzer*, 5 Cal., 70.

The statute does not require the name of the witness to be stated in the notice. Practice Act, 429.

There is no force in the objection of appellants, that the notice set forth the name of Dick Marley instead of J. D. Marley. *People v. Lockwood*, Cal. R., 1855; *Clarkson Dye v. Bailey*, 2 Cal., 383; 1 Green. Ev., 421.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

This was an action to recover possession of certain mining-claims, and for damages. The plaintiffs had judgment, and the defendants appealed.

1. The first error assigned by defendants is, the Court erred in refusing to strike out the testimony of L. D. Paige. This witness gave testimony material to the issue. He was one of the original locators of plaintiffs' claims, which consisted of nine claims, each one hundred feet square. The witness said: "I sold out one claim to Jones, and one to Mears, and one and a half to Marley. I only sold my right, title, and interest, and that the boundaries were correct as I sold. I made a bill of sale in writing, to all I sold. I don't think I warranted the boundaries in the bill, but merely showed the boundaries, and told them if they turned out not to be correct, I would make them right, and I still feel bound to do so." The objection was upon the ground of interest. There was an issue between plaintiffs and defendants, as to the boundaries of the plaintiffs' claims. The

parol promise of the witness, that he would make good the boundaries of the claims, as represented by him, was no part of the contract; and he was not legally interested in the event of the suit. Had the suit failed, he could not have been made liable. The liability must be legal, not moral; and the consequent interest present, certain, and vested. (Code, §§ 392, 393.)

2. The second error assigned is, that the Court erred in allowing F. B. Fuller, one of the plaintiffs, to be examined as a witness. On the trial, the plaintiffs called and examined S. C. Woods, one of the defendants, for the *sole* purpose of proving the amount of gold taken by defendants from the ground in dispute. Upon cross-examination by the defendants, this witness proved the boundaries of the claims of plaintiffs, and certain admissions of two of the plaintiffs, whose names were not mentioned. The plaintiffs then offered the witness Fuller, in rebuttal of this *new* matter.

There was no error, it would seem, in this action of the Court. The testimony of Woods, upon his cross-examination, was to *new* matter, and not as to matter that would discharge, when his answer would charge, himself. His answers, during his examination-in-chief, if taken by themselves, would not charge him. He simply stated the amount of gold extracted by defendants, from the disputed mine. This, *of itself*, fixed upon him no liability. By his testimony, he did not concede the liability of the defendants, at all. His testimony went only to the *amount*, and not to the *right*, of property. When a party testifies that he executed and delivered the promissory note described, he charges himself, and may show that he has since paid the note. The testimony of Woods, given on cross-examination, being *new* matter, the plaintiffs had the right to offer themselves, or any one of them, as witnesses, in rebuttal. (Code, § 421.)

3. The third and last error assigned is, that the Court below erred in admitting the separate depositions of R. F. and J. D. Marley.

One of the objections goes to both the depositions. The notice was not sufficient by one day; but the defendants appeared before the officer taking the depositions, and after entering their objections because the notice was too short, they proceeded to cross-examine the deponents. This, we think, was a waiver of the objection. The object of the notice was to give the defendants an opportunity to appear and cross-examine. This they did. They were not bound to do so; but having appeared and cross-examined the witness, it was too late afterwards to make the objection. A party cannot fish for testimony, and then afterwards object for want of notice. He must take a consistent stand, one way or the other.

The separate objection to the deposition of J. D. Marley is, that he was described in the notice as Dick Marley. This ob-

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Hill v. Kemble.

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jection was obviated by the testimony of Marley, that he was as well known by that as by his proper name.

The separate objection to the introduction of the deposition of R. F. Marley was predicated upon the ground of interest. This witness was one of the first locators of the claims of plaintiffs, and had sold his interest to some of the plaintiffs, guarantying the title and boundaries, by written bills of sale. This was shown upon his cross-examination. No objection was taken to the testimony of the witness upon his examination or cross-examination, on this ground, and no objection appeared upon the face of the deposition. The fact of interest there appeared, but no statement that defendants would object to the testimony on the trial, for that cause.

It was too late to make the objection upon the trial, after defendants had appeared and cross-examined the witness. Such an objection must be taken at the earliest moment. The depositions of witnesses are only allowed in certain cases. If a party could be permitted to reserve his objection as to the interest of the witness until the trial, and then, for the first time, urge it, he could entirely defeat the right of the party to execute a release, and thus restore the competency of the witness. The testimony of the witness, to be received, must be given after his interest is removed. If the objection could be reserved until the trial, the party taking the deposition, in many cases, would have no power to obtain the benefit of the testimony. The party opposed has the right to waive any objection to the interest of the witness; and if he does not intend to do so, he should make known his intention at the earliest practicable moment. (1 Greenleaf on Evidence, § 421, and authorities there cited.)

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HILL v. KEMBLE *et al.*

The sureties, upon the official bond of an officer, are only responsible for the official acts, and not for private debts.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

This was an action on the official bond of constable George Haycock, to recover the sum of \$428, alleged to have been collected by said Haycock, on two several executions.

In the month of July, 1855, Haycock, as constable, received an execution issued out of Justice Sibley's Court, in favor of plaintiff, Hill, against Newman and others, for the sum of — dollars, upon which execution Haycock collected the sum of

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Hill v. Kemble.

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§217. Sometime in the same month, Hill recovered a judgment in said Justice's Court, against McAllister, for \$185. No execution was issued on this judgment. Subsequently Haycock purchased of McAllister a mining-claim, and paid for the same by satisfying this judgment. Hill assented to this arrangement, and agreed to look to Haycock for the amount of the judgment.

The money on the Newman execution was put in Haycock's safe; Hill was notified of its collection, and that the money was ready for him. Hill said that he had no use for it, and that if Haycock wished to use it he could do so. Haycock afterwards used the money. Three or four months after this Hill called on Haycock for the money, and, he not being able to pay it, it was agreed that Haycock should pay interest on the amount, at the rate of two per cent. per month. Haycock paid \$50 of the amount, to Hill's attorney. Judgment was rendered in favor of defendants, from which plaintiff appealed.

*C. J. Hillyer* for Appellant.

The plaintiff is entitled to recover from the sureties. *Reynolds v. Wood*, 5 Wend., 502; *Fulton v. Matthews & Mudge*, 15 John., 432; *Burge on Suretyship*, 203, 204.

*C. A Tuttle* for Respondents.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The facts, as found by the Court, fully support the judgment.

The sureties, upon the official bond of an officer, are only responsible for his official acts, and not for private debts he may contract on his individual account.

From the time when plaintiff declined to receive the money collected on his execution, and gave the officer permission to use it, it became a loan, for which the officer was individually responsible.

Upon the second judgment, no sum was ever collected by the constable, nor was any execution ever placed in his hands. By an agreement between the parties, the officer purchased a piece of property from the judgment-debtor, and assumed the payment of the debt.

Judgment affirmed.

## SHAW v. ANDREWS &amp; HILLER.

When the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions of which the interests were in conflict, in defence of an action brought by him for services as superintendent.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

This suit was brought to recover the sum of \$1,150, for services of plaintiff, as an architect, in superintending the erection of a building for defendants.

The defendants, among other things, allege, that on the first day of August, 1855, they contracted with plaintiff, Chesley, and Leavitt, to erect said building, and that on November 29th of the same year they had a final settlement with said firm, and paid them in full. The case was tried before a jury, and verdict and judgment for plaintiff for \$750. At the close of the evidence, defendants asked the Court to instruct the jury "that if they believe, from the evidence, that plaintiff was a joint-contractor with Chesley and Leavitt, for the erection of the building, then it would be against public policy that plaintiff should be the superintendent of the same building, and any contract for such superintendence, if proved, was void;" which instruction the Court refused to give, and defendants excepted and appealed to this Court.

*Thomas Sunderland* for Appellants.

The duties of a superintendent, and the interest of a contractor, are in direct conflict. It is the interest of the contractor to evade, in all possible ways, the conditions of a stringent contract. On the other hand, it is the duty of a superintendent to see that the contract, on the part of the contractor, is strictly complied with. The superintendent is the agent of the proprietor or owner. It is not possible for him, as agent of his principal, to deal with himself, nor can he, as agent, order and direct himself, as contractor.

The law forbids an agent to buy of himself, for his principal, because it is his interest to sell at the highest price; it is the interest of the principal to buy at the lowest price. The temptation to commit fraud is too great. The same principle will apply to the case at bar.

*W. S. Long* for Respondent.

We are at a loss to imagine upon what grounds it can be contended, that it is against public policy for the owner of a build-

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Hicks v. Green.

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ing to employ one of the contractors as superintendent. If the owner thinks proper to employ one of the contractors in this capacity, it is his right, and if any injury arises, he alone suffers.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This is an action to recover the value of the plaintiff's services as superintendent of a building erected by defendants.

Two points are presented upon appeal: first, that the verdict is not sustained by the evidence; second, that the Court erred in refusing to instruct the jury "that plaintiff, being one of the contractors for the erection of the building, it would be against public policy to allow him to act as superintendent of the same building; and any contract made with him by such superintendent was void."

There was no error in refusing this instruction; it may be true that the duties of superintendent are, in some respects, in conflict with the interest of the contractor; but certainly, if the defendants, with a full knowledge of his position, chose to employ the plaintiff, and to rely on his good faith and honesty for the discharge of his duties, there is no reason that he should not receive the value of his services, especially as there is no pretence that his duties as superintendent were not faithfully and satisfactorily performed.

Upon the other point, we have frequently ruled that we would not interfere with the finding of a jury upon questions of fact, when there was any evidence to sustain it.

Judgment affirmed.

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### HICKS v. GREEN.

Under a plea of the general issue, evidence of a counter-claim is not admissible, but should be especially plead.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This is an action of replevin, to recover household furniture.

The facts are as follows: Defendant, Green, on the fifteenth day of June, 1855, executed and delivered to the plaintiff an absolute bill of sale of certain household furniture, of the value of \$500. The property, at the time of the execution of the bill of sale, was not delivered, but permitted to remain in a house occupied by Green, he exercising acts of ownership over the same.

*Hicks v. Green.*

The property was still in the possession of Green at the commencement of this suit. Prior to the commencement of the action, plaintiff demanded of defendant the possession of the property, which he refused to surrender, and still holds.

The defendants answer, general issue.

On the trial, it was admitted by plaintiff, that the defendant could prove the following facts : first, the bill of sale from Green to Hicks was intended to secure a debt due by Green to Hicks ; second, that Hicks boarded at the house of Green for the period of six months after the said bill of sale was made ; third, that said board was worth the sum of seven hundred dollars, but the plaintiff objected to competency of such evidence, as a defence to this action. Plaintiff had judgment for the possession of said property. Defendants appealed.

*Brooks* for Appellant.

The decision of the Court below turned entirely on the point, that our defence was an equitable one, and that it could not be interposed in an action at law.

This Court has so fully decided this point in the case, *Thayer v. White*, 3 Cal., 228, and subsequent cases, that it is superfluous to discuss the same.

*Robert F. Morrison* for Respondent.

The defence sought to be established in this case did not grow out of the same transaction, but was a separate and independent matter, consequently it could not be set up, under the answer of general issue as an equitable defence.

The defendant should have set up in his answer the fact that he had a counter-claim. His answer is a general denial, and under it, he asserts the right to introduce new matter.

To allow such evidence, would be to defeat the intention of the Legislature. Prac. Act, 46. And it would also be contrary to the decisions of this Court in *Thayer v. White*, 3 Cal., 229 ; *Smith v. Rowe*, 4 Cal., 6.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The findings of the Court, which are supported by the evidence, fully establish the plaintiff's right to recover. The defence sought to be established by the appellant was in the nature of a counter-claim, and should have been specially pleaded. The evidence offered was not admissible under the general issue.

Judgment affirmed.

WILLIAMS *et al.* v. GREGORY *et al.*

On motion for a new trial, the filing of a counter-statement is a waiver of objections to want of notice of the intention to move for a new trial.

When it appears from the bill of exceptions signed by the judges, that the motion for a new trial was heard on statement, counter-statement, and affidavits, it cannot be objected that the statement was not settled.

APPEAL from the District Court of the Fifteenth Judicial District.

The facts of this case appear in the opinion of the Court.

*Lott & Sexton* for Appellants.

*Robinson & Beatty* for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action for diverting water from the ditch of plaintiffs. The only issues in the case had reference to the question of prior appropriation and the amount of damages. Plaintiffs had judgment, defendants moved for a new trial, which motion was overruled; and from the order overruling this motion, defendants have appealed to this Court.

This case was placed upon the calendar, upon motion of the counsel of plaintiffs, as a delay case. It is urged by them that there was no notice of motion for new trial, as required by section one hundred and ninety-five of the code, and that the statement was not settled by the Judge upon notice. The trial was had May 23d, 1857, and the statement filed May 29th, 1857. The plaintiffs filed a counter-statement on the 24th June, 1857, and a counter-affidavit November 30th, 1857. The motion was overruled December 2d, 1857. There is in the record no evidence of any notice of intention to move for a new trial. But we think this irregularity was waived by the act of filing the counter-statement. The object of the notice was accomplished without it. As to the objection, that the statement was not settled by the judge, it appears from the bill of exceptions signed by him, that the motion for a new trial was heard upon the statement, counter-statement, and affidavits on file. The reference in the bill of exceptions to those papers is sufficiently certain to make them a part of it. From these facts, it appears the defendants admitted the facts stated in the counter-statement and affidavit of plaintiffs. The record is not very well made up, but there are no substantial objections to it.

Coming, then, to the alleged grounds for a new trial, and

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Gorham v. Toomey.

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taking the counter-statement, as admitted by defendants, we see no error in the refusal of the Court to grant a new trial. The evidence before the jury was conflicting, and we cannot disturb the verdict. The other grounds alleged we think not sufficient.

Judgment affirmed.

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GORHAM *et al.* v. TOOMEY *et al.*

District Courts have no power to restrain the execution of the judgments or orders of Courts of co-ordinate jurisdiction.

All proceedings to enjoin judgments must issue from the Court having the control of such judgments.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

The facts necessary to understand the points decided, appear in the opinion of the Court.

*Shafter, Park & Shafter*, for Appellants.

*C. M. Brosnan* for Respondents.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This action was instituted in the Twelfth District Court, to enjoin proceedings under a judgment of the Superior Court of San Francisco.

In *Ricketts and Wife v. Johnson*, (decided in April, 1857,) we held that, under our system, the District Courts had no power to restrain the execution of the judgments or orders of Courts of co-ordinate jurisdiction, and that all proceedings to enjoin judgments must be issued from the Court having the control of such judgments.

By the act of March, 1857, abolishing the Superior Court, all judgments and actions pending therein were transferred to the Fourth District Court, which tribunal is fully competent to afford the plaintiffs all the relief to which they are entitled.

Judgment affirmed.

STROUT v. THE NATOMA WATER AND MINING COMPANY *et al.*

Where A received an assignment of stock in a corporation, and the stock was subsequently attached under a judgment against the vendor, and afterwards the stock was regularly transferred to A, who then obtained an assignment of the judgment under which the stock was attached: *Held*, that the assignment of the judgment at once merged the lien in the higher right, and that A, as regarded third parties, became the absolute owner of the stock.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

The facts of this case are fully stated in the opinion of the Court.

*Saunderson & Hewes* for Appellants.

By the assignment of the judgment of *Herrick v. Prindle* to Adams & Co., they acquired all the right and interest in the stock which *Herrick* had at the time of such assignment.

Adams & Co. held the stock as collateral security for the payment of a note due them from *Prindle*, and hence were pledgees of the stock, and as such, had a special property in it. Story on Bailments, § 303; *Woodruff v. Halsey*, 8 Pick., 333.

Adams & Co., therefore, held two liens on stock, one by contract and one by operation of law. These liens are analogous to a mortgage-lien, which cannot be separated from the debt, but follow the same wherever it may pass. *Johnson v. Blodget*, 5 Cow., 202; *Langdon v. Buel*, 9 Wend., 80; *Ord v. McKee et al.*, 5 Cal., 515.

At the time of the levy of the attachment in *Duffy v. Adams & Co.*, tenth day of July, 1855, the entry of the transfer from *Prindle* to Adams & Co., was made on the books of the company, subject to the judgment of *Herrick*.

To ascertain what are the rights of pledgees in the pledge, see *Edwards on Bailments*, 201, 188; *Jones on Bailments*, 118.

All kinds of personal property or chattels may be assigned or delivered in pledge. *Edwards on Bailments*, 189, 223, 237; *Prescott v. Hull*, 17 John., 285; *Hyatt v. Argenti*, 3 Cal., 151.

*Ralston & Wallace* for Respondents.

Adams & Co., by the assignment of *Prindle* to them, owned the stock, absolutely, subject only to the *Herrick* judgment, which they had purchased. The debt of this judgment, so far as it created a lien on their property, was extinguished. *Bouvier's Law Dictionary*.

Where there is a confusion of rights, and the debtor and cred-

itor become the same person, there is an immediate merger. 2 Vesey, Jr., 264; *Gardner v. Astor*, 3 John. Ch. R.

Parties are always presumed to have intended the legal consequences of their acts, and as the law implies a merger, such consequences must have been intended, in the absence of any evidence to the contrary.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The facts necessary to explain the decision of this case, were substantially these:

1. On the fifteenth day of October, 1853, John R. Prindle executed a note to Adams & Co., for one thousand five hundred dollars, and pledged to them, as collateral security, two shares of the stock of said company, of about the value of one thousand eight hundred dollars. There was, however, no transfer of the stock upon the books of the company.

2. On the thirty-first day of January, 1854, Bruce Herrick sued Prindle, and attached the stock. Judgment was recovered for four hundred and twenty dollars and costs; and on the thirty-first of March, 1854, Herrick assigned the judgment to Adams & Co.

3. After the levy of the attachment, Prindle endorsed the certificate of stock to Adams & Co., and on the eleventh day of February, 1854, the secretary transferred the stock to Adams & Co., upon the books of the corporation, subject to Herrick's attachment against Prindle.

4. On the tenth day of July, 1855, James Duffy sued Adams & Co., and attached the stock as their property. Judgment was obtained against Adams & Co. on the twenty-eighth of August, 1855, execution was issued, and the stock was sold by the sheriff the fourth of September, 1855, to the highest bidder, when Ralston and Wallace became the purchasers, for nine hundred and thirty dollars.

5. On the tenth of September, 1855, Strout obtained a judgment against Adams & Co., upon which execution was issued the fifteenth of October, 1855, and levied upon the Herrick judgment; and on the twenty-second of the same month, the judgment was sold by the sheriff to the highest bidder, and plaintiff became the purchaser, for fifteen dollars. On the same day, plaintiff caused an execution to be issued on the Herrick judgment, under which the said shares were sold by the sheriff, and the plaintiff became the purchaser, for four hundred dollars.

This suit was brought to compel a transfer of the shares to the plaintiff, and to recover the dividends previously received by Ralston and Wallace. The defendants had judgment in the Court below, and the plaintiff appealed.

In the case of *Weston v. The Bear River and Auburn Water*

and Mining Company, (4 Cal., 186,) it was decided by this Court that no transfer of shares in the capital stock of a corporation is good as against third parties, unless such transfer be entered on the books of the corporation. It was held in that case, that "the Legislature intended to protect the public from the fraud which might be perpetrated by a sale or hypothecation of the certificates passing the legal or equitable title, while the books of the company induced credit to the vendor, by holding him out to the world as the owner of such stock."

It is conceded, that the pledge of the stock to Adams & Co., not entered upon the books of the corporation, conferred no rights to them as against Herrick, the creditor of Prindle. The pledge being only a private arrangement between Prindle and Adams & Co., and Prindle being held out to the world by the books of the corporation as the owner of the shares, the pledge was void as against third parties. The principle clearly established by this decision is, that the books of the corporation must constitute the test of the rights of third parties. They can only look to the books as their criterion.

If the shares must be treated as the property of Prindle so long as he was the ostensible owner upon the books of the corporation, why should not Adams & Co., under the legitimate application of the same principle, be held as the owners, after the shares were transferred to them? The transfer of the shares upon the books of the corporation to Adams & Co., was absolute and unconditional, except as to the lien of the Herrick judgment. Subject to that judgment, they were, upon the face of the books, the absolute owners.

We can perceive no difference in principle between the two cases. The intention of the Legislature was to prevent frauds on third parties, as well as to protect the corporation. The language of the statute is very explicit. By the transfer to Adams & Co., they were the apparent owners of the shares, and the private arrangement between Prindle and them could not affect third parties in any way.

Conceding that Adams & Co. must be regarded as the owners of the shares on the eleventh of February, 1854, subject to the lien of the Herrick judgment, what was the legal effect of the assignment to them of that judgment on the thirty-first of March following?

We think the assignment of the judgment at once merged the lien in the higher right, and that Adams & Co., as regarded third parties, became at once the absolute owners of the stock.

"Rights are said to be merged," says Bouvier, "when the same person who is bound to pay is also entitled to receive. This is, more properly, called a confusion of rights, or extinguishment."

See, also, the opinion in the case of *Clift v. White*, 15 Barb. S. C. R., 70; and same case, 2 Kernan, 519.

The shares being subject to the lien, and Adams & Co. being the owners of the stock, they were compelled to discharge the lien of the judgment to save the stock. This they did by taking an assignment of the judgment. By taking this course, instead of paying the judgment, they retained the right to issue execution against Prindle. But as to the lien upon the property attached, the assignment had the effect to extinguish it.

Judgment affirmed.

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### ROBINSON *et al.* v. MAGEE.

Whatever provision of a statute substantially defeats the end contemplated by the parties in making a contract, must impair its obligation. As the law enters into the contract and forms a part of it, the obligation of such a contract must depend upon the law existing at the time the contract was made. The contract being then complete and operative, the Legislature cannot, by a subsequent act, impair its obligation by requiring the performance of other conditions not required by the law of the contract itself.

The power to impose conditions after the contract is once complete and perfect, is nothing but the power to impair its obligation, and this the Constitution has prohibited.

The provisions of the act of April twenty-seventh, one thousand eight hundred and fifty-five, requiring all persons holding certain warrants upon the treasurer of Calaveras county, to present the same for registry before a certain day or be for ever barred from enforcing the payment thereof, are therefore unconstitutional.

APPEAL from the District Court of the Fifth Judicial District, County of Calaveras.

The facts of this case appear in the opinion of the Court.

*Robinson, Beatty & Botts, in propria personæ.*

The law requiring creditors of Calaveras county to register their claims against the county, and in the event of non-compliance with requisition, declaring the debt forfeited, is unconstitutional and void, so far as the forfeiture is concerned.

The Legislature cannot impose on a creditor any condition whatsoever, the non-compliance with which will forfeit the debt. The Constitution of the United States provides "that no State shall pass any law impairing the obligation of contracts." The obligation of Calaveras county was absolute to pay the debt for which the warrant was issued. It was an obligation without condition. If it was in the power of the Legislature to impose one condition onerous to the creditor, it might impose any other. *Blair et al. v. Williams*, 4 Little's Ky. R., 35; *Lapsley v. Bra-shears et al.*, 4 Little's, 47.

We contend that we did comply with the requirements of the law.

The law only requires that the creditor shall present the same to the auditor of Calaveras county for registry on or before the first day of July, A. D., 1855. It does not require that the presentation shall be made at any particular place.

*S. W. Brockway* for Respondent.

The act requiring the registration of indebtedness is not unconstitutional and does not "impair the obligation of contracts," but is, in its provisions, virtually an act of limitation, and as such, merely affects the plaintiff's remedy and not their right. The act has no retrospective operation. *Billings v. Hall*, Jan. T., 1857.

Public policy requires the approval, and by no other means could the debt of the county of Calaveras have been apporportioned.

BURNETT, J.—This was an application to the District Court for a *mandamus* to compel the defendant, as Treasurer of Calaveras county, to pay an auditor's warrant, issued as evidence of county indebtedness, before the passage of the act of the Legislature of May 11, 1854, dividing that county, and organizing the county of Amador. The subsequent act of the Legislature, approved April 27, 1855, provided that "all persons holding orders or warrants upon the treasurer of Calaveras county, issued prior to the time of the organization of Amador county \* \* \* \* \* shall present the same to the auditor of Calaveras county for registry, on or before the first day of July, 1855;" and in case any such person should fail to so present his claim, he should be forever thereafter barred from enforcing the payment thereof, and the same should be deemed canceled. The warrant in this case was issued to the County Judge for one quarter's salary, and came to the plaintiffs by purchase. The warrant was presented, within the time limited, to the auditor, not at his office, but at the bar-room of a public hotel. The auditor received the warrant, promised to register it, and then placed it with the bar-keeper, for safe custody, where it remained until after the expiration of the time mentioned in the act, and was never registered. Upon this state of facts, which is not disputed by either party, the District Court refused the writ, and the plaintiffs appealed.

The first point made by the plaintiff is, that the provision requiring pre-existing creditors of the county to register their warrants on pain of forfeiture of their claims, is unconstitutional and void, because it impairs the obligation of contracts. The Constitution of the United States provides that "no State shall pass any law impairing the obligation of contracts." The

same provision, in substance, is contained in the Constitution of this State.

It must be conceded that the intention of the Constitution was to secure great *practical results*. It is equally true, that this provision was intended to protect *individuals*. The powers of government, among savage tribes of men, are mainly exerted to protect the particular community against other opposing communities. Individual rights are mostly left to individual protection. Wrongs are redressed by the person injured, or by his relatives. But among civilized nations, the leading intent of government is to regulate and protect the rights of the individual. The individual surrenders up the natural rights of self-protection, and, in consideration of this surrender, he receives the protection of the State. Whatever the State, therefore, binds itself to do, or not to do, must be observed. If the Constitution of the State (as, for example, that of Great Britain,) merely distributes and classifies, but does not *limit* the powers of government, then its discretion is the only measure of its powers. But where a Constitution *limits* the powers of government, the State can only exercise the discretion given. It is, therefore, the peculiar glory of our Constitution, that a single individual can successfully resist the claims of the whole community, when he is in the right.

The word obligation, as found in this provision, is not used in its widest sense. It is the "*obligation of contracts*" that cannot be impaired. The obligation of other things than contracts is not protected. A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing. The only end and object of the contract, is the doing or not doing the particular thing mentioned. The *practical result* is the only end aimed at by the parties, and the obligation of the contract is the vital binding element that secures this practical consummation.

If, then, the intention of the Constitution was to secure great practical results by the protection granted to *individuals*, this protection can only consist in attaining the only *end* contemplated by the contract itself. If that end be substantially defeated by the law, the operative force of the obligation of the contract is impaired. Any other than practical and efficient protection would be idle.

A criminal statute without a penalty, and a civil right without a remedy, never can exist in the practical theory of government. It is not the intent of government to establish mere abstract and inoperative principles. A dormant right, that cannot be enforced, is no right at all. To say that the law will give a party a judgment, and yet refuse him an execution to enforce it, is to give him the shadow and withhold the substance. Such a position would be like the morality of the debt-

or, who will never *deny* the debt; would pay it *if* he had the money, but never uses any exertions to get it; or like the right of appeal only allowed to a criminal *after* the sentence has been executed.

The right and the remedy, in the theory of all practical and just governments, must stand or fall together. To deny the right, is necessarily to deny the remedy; and to admit the right and yet deny the remedy, is to impair the right, and to render it either partially or wholly inoperative. It is more consistent to deny both the right and the consequent remedy, than to admit the right, and then, in the face of this admission, deny its inseparable incident—its just result.

As the Constitution intended to prohibit the Legislature from defeating a certain *end*, it does not matter how, or by what means, or in what manner, this end is sought to be defeated; the act is equally unconstitutional. If the *purpose* be defeated, the manner in which it is done is unimportant, and cannot change the substantial result. If, therefore, the act will not allow the creditor a judgment; or, if a judgment be allowed, and all means of enforcing it be prohibited, it is still unconstitutional. And if both be allowed, but under *conditions* which impair the right, it is equally a violation of this provision.

The obligation of a contract may be impaired, without being entirely destroyed. The last must include the first, but the first does not necessarily include the latter. The act can no more destroy, than it can impair, the obligation of a contract.

If these views be correct, then whatever provision of a statute substantially defeats the *end* contemplated by the parties in making the contract must impair its obligation. And, to ascertain the end contemplated by them, we must look to the law, as it existed at the time when the contract was made. All men are presumed to know the law; and the law then existing enters into, and forms a part of, the contract, without any express stipulation to that effect. Parties, in entering into contracts, only expressly stipulate as to matters that cannot appear without such stipulation. It would be idle for them to say, expressly, that they incorporate in their agreement the law then existing.

As the law enters into the contract, and forms a part of it, the obligation of such contract must depend upon the law existing at the time the contract was made. The contract being, then, complete and operative, the Legislature cannot, by a subsequent act, impair its obligation, by requiring the performance of *other* conditions, not required by the law of the contract itself. The rights, as well as the intentions, of the parties, are fixed and ascertained by the existing law. Therefore, to require the performance of *other* conditions, to make the contract operative, is to impair its obligation. The power to impose conditions, after the contract is once complete and perfect, is nothing but the

power to impair its obligation, and this the Constitution has prohibited.

It would be impracticable to review the numerous decisions of the federal and State tribunals, upon this subject. I may, however, refer to the able opinions of Chief Justice Boyle, and Justices Mills and Ousley, in reference to the Relief Laws of Kentucky, and to the opinion of Chief Justice Marshall, in the case of *Sturgis v. Crowninshield*, (4 Littell, 35, 117; 4 Wheaton, 191.) For a more full expression of my own views, I refer to my opinion in the case of *Stafford and others v. Lick and others*, April Term, 1857.

For the reasons stated, I am constrained to consider that provision of the act of April 27, 1855, declaring the claims of pre-existing creditors forever barred, if they failed to comply with the new conditions imposed, as impairing the obligation of contracts, and, therefore, void. It is not necessary, under this view of the case, to notice the other points made.

There being money in the county treasury, applicable to the payment of this warrant, let a peremptory mandate issue.

FIELD, J.—I concur in the judgment that a peremptory *mandamus* issue.

### THE PEOPLE v. FOWLER.

The County Court has the sole appellate jurisdiction in all cases, civil and criminal, arising in Justices' Courts, subject to such restriction as the Legislature may impose by making the decisions of the Justice final in such cases as may be determined by law.

The Court of Sessions has no appellate jurisdiction in either civil or criminal cases. Their jurisdiction is original, not appellate. In all cases where an appeal lies from a Justices' Court, it must be taken to the County Court.

The Constitution vests the Legislature with power to confer such jurisdiction on Justices' Courts as are not exclusively vested in other Courts. The act conferring criminal jurisdiction on Justices' Courts is constitutional.

CERTIORARI to the Court of Sessions of Placer County.

The facts of this case appear in the opinion of the Court.

*Myers & Mills* for Petitioner, B. F. Peck.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The defendant was tried and convicted, before a justice of the peace, for malicious mischief, and appealed to the Court of Sessions; where, upon a trial *de novo*, he was acquitted, and the Court adjudged Peck, the prosecutor, to pay the costs, upon the

ground that the prosecution was without probable cause. A writ of *certiorari* was issued upon the petition of Peck, and the proceedings brought before this Court.

The right of appeal from a final judgment, in a criminal case tried in a Justices' Court, to the Court of Sessions, is given by the first subdivision of section 481 of the act regulating criminal practice. (Wood's Dig., 308.)

There are two questions properly arising under this provision :

1. Is it constitutional?
2. If so, must the trial be *de novo* in the Court of Sessions?

The sixth article of the Constitution of this State is more full and minute in its provisions in reference to the powers of the different Courts than perhaps any corresponding article in the Constitution of any other State. "It seems," as remarked by this Court, in the case of *Zander v. Coe*, (5 Cal. Rep., 231,) "to have been drawn with great care and skill, and, as far as possible in an organic law, endeavors to establish a complete judicial system." And it would seem to be equally true that a fair and just construction of all the sections of this article, when taken together, would leave all its provisions entirely consistent with each other, and perfectly capable of harmonious and practical application.

This article has often been before this Court for construction. In the case of *Caulfield v. Hudson*, (3 Cal. R., 389,) it was decided that the District Courts could possess no *appellate* jurisdiction. This decision was again approved in the subsequent case of *Reed v. McCormick*, (4 Cal., 342.) In the first part of the sixth section the phrase "original jurisdiction" is used, when referring to jurisdiction in cases in law and equity; and, although the word "original" is dropped in the subsequent clause, and the word "jurisdiction" stands alone, it still means original jurisdiction only. The rule of construction established by these decisions is this: that when certain powers are, in form, *affirmatively* bestowed upon certain Courts, they are still *exclusive*, unless there be some exception specified in the Constitution itself, or the power to prescribe the cases to which the jurisdiction should extend be expressly given to the Legislature. For example: there is affirmatively conferred upon the District Courts certain original jurisdiction in civil cases, and there is no specified exception stated, and no power expressly given to the Legislature either to limit or increase this jurisdiction; therefore it is, as to the class of cases enumerated, *exclusive*. In criminal cases the jurisdiction is unlimited and without *specified* exceptions; but the Legislature has express power to prescribe the cases to which the jurisdiction shall extend; and, therefore, the criminal jurisdiction, as to such cases, is not made exclusive by the Constitution.

We will now proceed to apply this rule of construction to the case before us.

The eighth section provides that Courts of Sessions shall have "such criminal jurisdiction as the Legislature shall prescribe." Is this jurisdiction original or appellate, or both? The Constitution expressly confers *appellate* jurisdiction on the Supreme and County Courts. This being true, can we say that appellate jurisdiction was intended to be conferred upon the Court of Sessions when there is no express provision to that effect? And if we could say that appellate jurisdiction is conferred upon Courts of Sessions in criminal cases, because the word "jurisdiction" is general, and used without restriction, could we not say, with equal propriety, that appellate jurisdiction, in the same cases, is conferred upon the District Courts, for the reason that the same word is used, without restriction, in the latter part of the sixth section?

It would seem that all the jurisdiction that could be exercised by the Courts of Sessions must be original, and not appellate.

The correctness of this view is further shown, from other provisions of the sixth article, to which we will now refer.

The question regards criminal jurisdiction; and the sixth section gives the District Courts unlimited jurisdiction of this kind, in all cases "*not otherwise provided for.*" There is here no exclusive jurisdiction given the District Courts in criminal cases. The eighth article confers such criminal jurisdiction upon the Courts of Sessions as the "*Legislature shall prescribe.*" Here, no exclusive jurisdiction is given by the Constitution. So far, the power to prescribe the jurisdiction is given to the Legislature; but the Constitution itself does not confer it *exclusively*, either upon one or the other of these Courts, singly, or upon both, in different specified portions. We then come to the fourteenth section, which relates to justices of the peace, who compose a part of the judicial department, by the provisions of the first section of the article; and the power is given the Legislature to "*fix by law their powers, duties, and responsibilities.*"

The sixth article, in previous sections, had conferred certain exclusive powers upon other Courts; and the Legislature is left, by the fourteenth section, to confer such powers upon justices of the peace, as were not exclusively vested in other Courts. (5 Cal., 230.) And, as no exclusive criminal jurisdiction was conferred, either upon the District Courts or upon Courts of Sessions, it is competent for the Legislature to confer such portions of it upon justices of the peace as shall be considered proper.

If these views be correct, those portions of the act of the Legislature, conferring criminal jurisdiction upon Justices' Courts, are in strict conformity with the Constitution. This being conceded, has the Constitution vested the power to hear appeals from these Courts *exclusively* in the County Court?

By the provisions of the ninth section, "the County Courts shall have such jurisdiction, in cases arising in Justices' Courts, as the Legislature may prescribe;" and, by the fourteenth section, the Legislature shall "also determine in what cases appeals may be made from Justices' Courts to the County Courts."

It may be safely assumed that the Legislature has the right, under the provisions of these two sections, to permit appeals to the County Courts in *all* cases arising in Justices' Courts, whether *civil or criminal*. The power of the Legislature "to determine in what cases appeals may be made from Justices' Courts to the County Court," is expressly conferred by the Constitution; but there is no such power expressly conferred in reference to appeals from Justices' Courts to the Court of Sessions. And if no such power be expressly given to the Legislature, can it be inferred, consistently with the rule of construction established by this Court, and the consistent intent of the sixth article?

The appellate power of the County Court is ample for all purposes, in all cases arising in Justices' Courts. Why, then, should the same power be conferred upon Courts of Sessions? Why should appeals be taken from the same Court of original jurisdiction, to two different appellate tribunals? Why should the same inferior be compelled to obey two different superiors? Is it not the more plain, simple, and consistent rule, that the same appellate tribunal should try all appeals from the same inferior Courts?

The Constitution gives the Legislature the right to apportion the original criminal jurisdiction among certain Courts mentioned. This being so, can the Legislature confer original jurisdiction upon the County Courts? This power is affirmatively given, and it is exclusively confined to the Courts mentioned, namely: the District Courts, Courts of Sessions, and justices of the peace. So, the power to determine in what cases appeals may be made from Justices' Courts is affirmatively given, and must be exclusively confined to the Court mentioned, namely: the County Court. If the Constitution intended to confer upon the Legislature the power to provide for appeals from Justices' Courts to the Courts of Sessions, then this right would have been expressly given. Why was it expressly given as to the County Courts, and not so given as to Courts of Sessions, if intended to be given in both cases alike? If there was any necessity for express provision as to one, there was the same necessity, also, as to the other.

There was ample reason for confining the right of appeal from Justices' Courts to the County Courts. It is not, in the nature and reason of the case, proper to confer appellate jurisdiction upon a Court having *original* jurisdiction over the same class of cases? Our Constitution has studiously avoided this. The Supreme Court has only appellate jurisdiction. The County Court

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Fairbanks v. Dawson.

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has no original criminal jurisdiction, and no original jurisdiction in civil suits, except in such *special cases* as the Legislature shall prescribe, and these special cases cannot arise in Justices' Courts. (5 Cal. Rep., 43.) There are but two appellate tribunals under the Constitution: the County and Supreme Courts; and neither of these Courts has the right to take original jurisdiction of any case they can hear upon appeal.

It may be objected to this view, that the right is expressly given the Legislature by the ninth and fourteenth sections, to determine in what cases appeals may be made from Justices' Courts to the County Courts; and this power necessarily includes the right to permit appeals to the Courts of Sessions. But such is not the logical result. The Constitution had another object in view.

The right of appeal is affirmatively given in certain cases by the fourth section, and this right cannot be taken away by act of the Legislature. But in reference to other cases, when the right of appeal does not exist under the Constitution, it is discretionary with the Legislature. In all such cases the Legislature may make the decision of the tribunal which has *original* jurisdiction of the case, *final*. The Legislature, therefore, can determine in "*what cases*" appeals may be made from Justices' Courts. It would be competent for that body to restrict this right to cases involving not less than a specified sum. This is the discretion allowed by the ninth and fourteenth sections to the Legislature.

Under the view we have taken of the first question, it is unnecessary to examine the second.

The judgment of the Court of Sessions was erroneous, and that Court will dismiss the appeal.

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#### FAIRBANKS *et al.* v. DAWSON *et al.*

A part payment made *before* a contract has expired by limitation, is insufficient to take the case out of the statute.

The object of the statute was to substitute a written contract for that which might be implied from admissions, and to avoid the mischief arising from parol testimony to prove either an express promise, or facts from which a promise would follow as a legal and logical result.

APPEAL from the District Court of the Fifth Judicial District, Tuolumne County.

The statement of facts appears in the opinion of the Court.

*Robinson & Beatty* for Appellants.

The settled doctrine in regard to the Statute of Limitations is, that the debt is not destroyed, but only the remedy is lost if the action is not commenced within the time limited by statute. Chitty on Con., 706-717, and authorities there cited. The pre-existing debt is still a sufficient consideration for a new promise.

The Statute of Limitations only runs from the last promise to pay. That promise may be express or implied.

By the thirty-first section of the Statute of Frauds, the Legislature have required every acknowledgment or promise to be in writing. By the word "promise," is meant "express promise," as contradistinguished from acknowledgment or other acts which would raise an implied promise. The statute does not alter the common law rules of evidence in regard to the proof of the substantive fact of payment. That fact may be proved by any evidence admissible according to the rules and usages of the common law. That fact once proved, the law raises, from the existence of the fact, an implied promise, or a renewal of the contract, which dates from the day of payment. The thirty-first section is, in reality, only a rule of evidence, requiring certain facts to be proved in a certain way, and excludes all other evidence of those facts.

This construction is not only sustained by the language of the act, by analogous reasoning, but it has been so construed by the highest authorities, both in England and America, in adjudicating on similar statutes. Chitty on Contracts, (marginal page,) 718, 719.

The modern doctrine is, that notes payable on demand, with interest, are not due until demanded. The very fact of interest being provided for, shows that the parties contemplated giving and receiving time. How then can the statute commence running before demand? — *v. White*, 10 Eng. Com. L. R., 600; Chitty on Bills, 611.

#### *Barber for Respondents.*

Our statute differs materially from the English statute. Our statute wholly omits the expression "by words only," and provides that "no acknowledgment or promise" shall be sufficient unless in writing. This, *ex proprio vigore*, excludes all acknowledgments, whether by word or act, unless the evidence thereof is contained in writings signed by the debtor.

For the construction of the English statute, see C— *v. Jones*, 6 Eng. Ch., 573; 2 Parsons on Con., 357, note.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring. FIELD, J., dissented.

The defendants jointly and severally executed their promissory note to plaintiffs, payable on demand, with interest, and dated April 16, 1853. On the sixth day of October, 1853, Pat-

terson paid the sum of fifty dollars upon the note. Suit was brought upon the note, May 20, 1857, and the defendants pleaded the Statute of Limitations. The Court below held the plea good, and gave judgment for the defendants accordingly, from which judgment the plaintiffs appealed to this Court.

The facts being admitted, the case presents two questions: first, whether a part payment, made *before* the time limited has expired, will take the case out of the statute; and second, whether the part payment made by one joint and several maker will affect the other.

The thirty-first section of our Statute of Limitations provides, that "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same be contained in some writing signed by the party to be charged thereby." Is a part payment included within the words "acknowledgment or promise?"

Before the passage of Lord Tenterden's Act, (9 Geo. IV, chap. 14,) a verbal admission of the debt within the time limited by the statute, was held in England to be sufficient to avoid the act. It was said by Tindal, C. J., in *Hayden v. Williams*, (7 Bing., 163, 166,) that the statute "did not intend to make any alteration in the legal construction to be put upon acknowledgments made by defendants, but merely to require a different mode of proof—substituting the certain evidence of a writing, signed by the party chargeable, for the insecure and precarious testimony to be derived from the memory of witnesses."

At an early period after the passage of the English Statute of Limitations, (21 James I, chap. 16,) an impression prevailed, that the statute was not to be favored; and, accordingly, a very slight acknowledgment, proved by as slight testimony, was permitted to overcome the statute. (Parson's Mercantile Law, 233; 10 Barb. S. C., 568.) But the modern cases upon this subject have established the rule, that to take a case out of the operation of the statute, there must have been either an *express promise* to pay, or an admission of the debt in terms so distinct as that a promise might reasonably be inferred therefrom. If, however, the admission was accompanied by qualifying words, then it would not amount to a promise. (Chitty on Con., 712–714.)

The object of our statute was to change a rule of evidence, and now to require *written*, where *verbal* testimony was formerly sufficient. The matter to be proved is the acknowledgment or promise, and the only competent *evidence* is a writing signed by the party to be charged. But whether the acknowledgment or promise, *when proved*, be sufficient to take the case out of the operation of the act, is left to depend upon reason and authority, as it did before. (20 Eng. C. L. R., 82.)

By the first section of Lord Tenterden's act, it is provided that

nothing therein "contained shall alter or take away, or lessen the effect of any *payment* of any principal or interest made by any person whatsoever." (Chitty on Con., 712, a.) Under this express proviso, the effect of a part payment remains the same as before the passage of the act. But as no such proviso is found in our Statute of Limitations, the question arises, whether there is any distinction intended between a promise or acknowledgment in express words, and a promise or acknowledgment in act.

It is plain, that the makers of the English statute thought it necessary to put in this special proviso, otherwise the other portion of the act would include a part payment. It will be seen, upon examination, that the language of the act of Parliament and that of our statute, is very similar, showing that our act was copied from the English statute. The language of the British statute is, that "no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of said enactments, \* \* \* unless such acknowledgment or promise shall be made or contained, by or in some writing, to be signed by the party chargeable thereby."

The difference in the language of the English and California statutes is very slight, while the substance and meaning are the same. The English statute was passed as explanatory of a previous statute, while the section of our statute was but a part of the original act itself. Hence, some slight difference in phraseology was required.

From the fact that the proviso found in Lord Tenterden's act is left out of our statute, it would seem to be clear that the Legislature intended to put all acknowledgments and promises upon the same footing, to be governed by the same rule of evidence. A part payment has always been regarded simply as an acknowledgment of the debt by act, and not by word; but the same effect was given to the act of part payment, as was given to an express acknowledgment of the debt. They were both held to be evidence of a fresh promise. (Chitty on Contracts, 712, 721.) An admission of a party, by word or act, that he owes another a certain debt, is evidence of a promise to pay that debt. The object of the statute was to avoid the mischief arising from parol testimony to prove either an express promise, or facts from which a promise would follow as a legal and logical result.

The true theory of the statute would seem to be this: The acknowledgment or promise is incorporated with the terms of the original contract, and, both taken together, constitute a *new* contract. By the legitimate operation of the statute, the original debt is paid when the time fixed by the act expires. In making the original contract, the parties incorporated into it the terms of the statute, without any express stipulation to that effect. Under the terms of the contract, as controlled by the existing

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Harvey v. Fisk.

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law, the debt is paid by the failure of the creditor to sue within the time *agreed upon*. But the original debt, being a good moral consideration, is sufficient to support a new contract.

It is unnecessary to examine the other questions.

The judgment of the District Court is affirmed.

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### HARVEY v. FISK.

In an action against a purchaser at sheriff's sale, for not paying the amount of his bid, it cannot be set up in defence, that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

This was a motion by plaintiff, as constable, made on notice, under the two hundred and twenty-fourth section of the Practice Act, for judgment of \$650, against defendant Fisk, as defaulting bidder at a constable's sale, of property under execution. The only defence relied upon by defendant was, the illegality of the officer's notice of the sale of the property.

*Francis J. Dunn* for Appellant.

*Taylor & Kirkpatrick, and William M. Stewart*, for Respondent.

A defective notice does not affect the title of a purchaser of property at sheriffs' or constables' sales. *Smith v. Randall*, 6 Cal., 47.

The objection, that there was no tender, by Harvey, of a certificate of sale, has been decided by this Court, in the case of *The People ex rel. Kohler v. John C. Hays*, 5 Cal., 66. A tender is there held unnecessary.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was a proceeding under the two hundred and twenty-fourth section of the Practice Act, to recover from defendant, the loss occasioned by his refusal to pay the amount of his bid at a sale under execution of certain property.

There are numerous objections to the rejection of testimony offered by defendant, which it will not be necessary to notice in detail, as the testimony offered was not pertinent to any material issue raised by the pleadings.

The plaintiff alleged the sale of the property under execution, after lawful notice, the purchase by defendant, his refusal to pay

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Escolle v. Merle.

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the purchase-money, the re-sale of the property, for a less sum than that bid by defendant.

Defendant admitted all the facts alleged, except that lawful notice of the sale was given, and set up fraud and collusion in the officer and purchaser at the second sale. No evidence was introduced to prove the allegation of fraud, the defendant seeming to rely on the insufficiency of the notice, and the failure of the officer to tender a certificate of sale.

In the case of *Smith v. Randall*, (6 Cal., 47,) we decided that the neglect of the officer making a sale, to give the notice required by law, did not affect the validity of such sale, but that the party aggrieved had his remedy against the officer, for any injury sustained by reason of his neglect.

The question raised by the pleadings, as to the sufficiency of the notice, was therefore immaterial, as it did not affect the validity of the sale, or the obligation of the defendant to pay the amount of his bid: the evidence on this point was properly rejected.

The evidence offered, to show that at the time of the sale there were several executions against the property in the hands of the officer, one of which belonged to defendant, was properly rejected: first, because no such issue was raised by the pleadings; and second, the fact, if admissible and true, was no defence, as there was no offer to pay the sum bid, after deducting the amount due on defendant's execution.

The objection, that there was no tender of a certificate of sale, is frivolous; the question has already been twice decided by this Court. (See *Kohler v. Hays*, 5 Cal., 66, and *Williams v. Smith*, 6 Cal., 91.) The appeal was without merit, and was evidently taken for delay.

Judgment affirmed, with ten per cent. damages and costs.

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### ESCOLLE AND WIFE v. MERLE.

When an appeal is taken on questions of fact alone, the Appellate Court will not disturb the verdict, when there is any evidence to support it.

APPEAL from the District Court of the Twelfth Judicial District.

This action was brought to recover \$870, wages due from appellant to plaintiff, Adelaide Elizabeth, before her marriage with plaintiff, Honoré Escolle.

Defendant, in his answer, alleges, that he took Adelaide, when only twelve years of age, into his family, at the request of her

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mother, to raise; and that he supported, clothed, and protected her, until her marriage with plaintiff.

On the trial, defendant tried to prove the facts set up in his answer, by the letters of plaintiff, Adelaide, but failed to prove her handwriting. The case was tried by a jury, and verdict and judgment for plaintiff.

Defendant moved the Court for a new trial, and based his motion on two grounds: first, surprise upon the trial, which ordinary prudence could not guard against; second, insufficiency of the evidence to justify the verdict.

The Court denied the motion, and the defendant appealed.

*Sidney V. Smith* for Appellant.

There was no evidence to justify the verdict.

The evidence showed that the respondent's wife was taken by appellant to live with him out of charity. There was no evidence of agreement for wages. *Smith's Master and Servant*, 42; *Alfred v. Fitzjames*, 3 Espin., 3; *Murdock v. Murdock*, April T., 1857; *Nicholson v. Patchin*, 5 Cal., 474; *Rivers v. Chapman*, July T., 1855.

The Court erred in refusing a new trial, on ground of surprise. 3 *Graham* on New Trials, 953; *Taylor v. California Stage Co.*, July T., 1856.

*Isaac J. Wistar*, for Respondents.

No brief.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The appeal in this case is taken on questions of fact alone.

We are of opinion that the evidence introduced by the plaintiff was sufficient, if uncontradicted, to support the verdict; and we have uniformly held that we will not interfere with the verdict of a jury, when there is any evidence to support it.

The affidavit, and counter-affidavit, filed on motion for new trial, raised a question of fact as to whether the letters mentioned contained the admissions alleged by defendant and denied by plaintiff. This question was decided by the Judge below, and, we must presume, decided correctly.

Judgment affirmed, with twenty per cent. damages, and costs.

## MARKS AND WIFE v. MARSH.

In an action to foreclose a mortgage against a husband, where the defendant sets up the right of homestead, the Court should order the wife of defendant to be brought in as a party, as no decision upon the question of homestead can be conclusive, either upon the husband or the wife, unless both are parties.

APPEAL from the District Court of the Twelfth Judicial District.

This action was brought to foreclose a mortgage given by the defendant, August 29, 1854, to secure the payment of a promissory note of the same date, signed by defendant, and payable to N. J. Pflaum, or order, for \$4,000. At the time of the execution of the note and mortgage, N. J. Pflaum was unmarried, but subsequently married A. Marks. At the date of the note and mortgage, the defendant was married, and lived on the mortgaged premises as his homestead.

On the trial, the defendant proved, that at the date of the note and mortgage, he was married, and lived on the premises as his homestead. To the ruling of the Court, allowing this evidence, the plaintiff excepted; alleging, that the defendant, his wife not being a party, was estopped, by the execution of the mortgage, from setting up a claim of homestead to the premises. The plaintiff offered to prove, that at the time of the execution of the note and mortgage, that defendant represented himself to plaintiff as an unmarried man; which testimony was denied by the Court, and the plaintiff excepted. The Court gave judgment against defendant, for the amount specified in the note, and decreed that the premises described in the mortgage should be set apart as a homestead of defendant and his wife, and that said premises be discharged from the effect and lien of said mortgage. From which judgment, plaintiff appealed.

*F. M. Haight* for Appellant.

The wife not being a party to the suit, defendant was estopped by the execution of the mortgage to deny the operation thereof, or to claim a homestead.

The husband cannot alone set a homestead. *Revalk et al. v. Kraemer et al.*, July T., 1857; *Dezell v. Odell*, 3 Hill, 215; *Petrie v. Fectter*, 21 Wend., 172; *Foster v. Newland*, ib., 94; *Watson's Ex. v. McLaren*, 19 Wend., 557; *Truscott v. Davis*, 4 Barb., 495.

The objection, of want of parties, was not taken at the trial, and, if it had been, the chancery practice is, to let the cause stand over, and amend.

*Gunnison, Parker & Cowles* for Respondent.

No brief on file.

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Domingo v. Getman.

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BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant, Marsh, executed a note and mortgage to N. J. Pflaum, then sole, but now the wife of A. Marks. This suit was brought to recover judgment upon the note, and to foreclose the mortgage. Defendant appeared, and set up the right of homestead. Upon the trial, a decree was rendered for defendant, and plaintiff appealed.

In the case of *Revalk and Wife v. Kraemer et al.*, July Term, 1857, we held, that legal proceedings, to be conclusive against either husband or wife, as to the homestead, must include both. And we then said, that, "When the husband appears alone and defends the suit, his right to the homestead is no more concluded by the decision than by his separate execution of the deed or mortgage."

When the husband appears and defends alone, any decision the Court could make in regard to the homestead, could not affect the rights of the wife, she not being a party to the suit. And such is the nature of the title to the homestead, that the rights of the husband cannot be affected without affecting those of the wife also. If no binding decision can be made when one of them only is a party, then it is idle for the Court to make any decision at all in such a case.

This is one of those cases in which no complete determination of the controversy can be had without the presence of both husband and wife; and when the fact of homestead was disclosed by the answer, the Court should have ordered the wife of defendant to be brought in, so that a final decree, binding upon all parties in interest, could have been made, without resorting to a multiplicity of suits. (Code, § 17.)

The judgment of the Court below is reversed, and the cause remanded for further proceedings.

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DOMINGO v. GETMAN *et al.*

When a party has given a promissory note, and the payee assigns the note, without recourse, after maturity, and suit is brought upon the note by the assignee, the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled: *Held*, that the case was a proper one for equitable relief, and the maker had the right to have the note canceled, so as to prevent future litigation.

If a party be improperly joined as defendant, the Court or jury, upon application, should first pass upon his case, and, after he is discharged, he could then be examined as a witness for the other defendant.

APPEAL from the District Court of the First Judicial District, County of Los Angeles.

The facts necessary to understand the points decided, appear in the opinion of the Court.

*Sloan & Hartmann* for Appellants.

Appellants in the Court below, after the filing of the bill, and before the answer, filed their motion to dismiss the bill.

1. For want of equity.
2. Because the matters set forth constituted a good defence in the suit at law, for the recovery of the note.

This motion was overruled by the Court, and the appellants excepted.

It is insisted in this case, that a Court of Equity had no jurisdiction, and that, therefore, the bill should have been dismissed, and the injunction dissolved, either upon the hearing of the motion, or upon the trial. It is a familiar principle that chancery will not sustain a suit where there is adequate remedy at law.

This is well defined in the case of *Thorn v. Williams*, 1 Car. L. R., 362.

It will be observed that in the bill, in the case at bar, not a single reason is given, or averment is made, why a Court of Law should be divested of jurisdiction, and why the matter should be heard in equity. No allegation is made that the complaint is remediless at law, or that the interference of a Court of Equity is necessary to prevent a wrong; or that a discovery is necessary from appellants, of anything that is essential to the complainant, to aid him in his defence at law. In fact, the bill is wanting in anything that would give chancery jurisdiction in the case.

In this State the reason no longer exists why bills of this kind may be brought on the ground of discovery alone. The statute permitting one party to call his adversary as a witness, in a trial at law, would be sufficient to do away with the necessity of such proceedings, even if bills of discovery were not abolished by the express terms of the statute itself.

The case of *Mitchell v. Oakley*, 7 Paige's Ch. R., 68, was on appeal from the decision of the Vice-Chancellor, dissolving an injunction upon the facts appearing upon the complainant's bill. It stated that the complainant made a note, payable to the order of J. M. Underhill, and entrusted it to the latter for the purpose of having it discounted at a bank, for complainant's benefit. But instead of doing this, Underhill sold it to the defendant as his own, at such a discount as, under the laws of New York, amounted to usury.

The Chancellor, in delivering his opinion, says:

"In cases of concurrent jurisdiction, when the complainant has a perfect defence in a Court of Law, if he chooses to avail himself of it, this Court will not grant a preliminary injunction in the first instance for the mere purpose of obtaining the exclu-

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Domingo v. Getman.

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sive jurisdiction of the case, and thus depriving the adverse party of his common law right of trial by jury. \* \* \* \* \*

But when he asks the interposition of the extraordinary power of this Court, by means of preliminary injunction, to deprive his adversary of the right of a common law trial, as to the matter of fact in dispute between them, he must show by his bill that some injustice would be done him; or that he would be deprived of some legal or equitable right if his adversary should be permitted to proceed at law."

The order appealed from was affirmed.

The case of *Perrine et al. v. Sticker*, 7 Paige Ch. R., 598, came before the Court on a demurrer to complainant's bill. The object of the bill was to obtain a perpetual injunction against the prosecution of a suit at law upon a usurious note, by one of the complainants as principal, and by the other as his surety to the defendant, upon a loan of money. The complainants alleged that the defendant had brought a suit at law upon the note, and that they were unable to prove the usury on the trial in the suit, as the facts were known only to themselves and the defendant. The demurrer was both as to the discovery and the relief sought by the bill. And the defendant alleged, among other causes of demurrer, that the plaintiffs had a perfect and adequate remedy at law, as the defendant to the bill might be examined by the complainants as a witness in the action at law, on the note, under the provisions of the act of May, one thousand eight hundred and thirty-seven, to prevent usury.

The following authorities also support the position here assumed: *Melick v. Drake*, 6 Paige, 470; *Williams v. Patterson*, 2 Overton, 229; *Cunningham v. Caldwell*, Hardin, 123; *Price v. Nesbit*, 1 Hill Ch., 445.

3. The Court erred in refusing to permit the defendant Getman to be sworn as a witness for his co-defendant Rhodes.

In the trial of the cause below, the case of *Gates et al. v. Walsh et al.*, decided at the April T., 1856, of this Court, was relied upon as supporting the ruling of the Court. That was an action at law. The rule has always been different in equity.

It is true that the first subdivision of section 392 of the Practice Act, prohibits in general terms a party to an action or proceeding from being a witness. But the statute certainly means when a person is properly a party. Were the rule different, a plaintiff would at all times have it in his power to defeat the ends of justice, and prevent the defendant from adducing any proof by witnesses by making all the witnesses of the defendant parties to the suit.

In *2 Vesey and Bea.*, 401, the rule is laid down as follows: "In chancery, a co-defendant may be examined for another if not interested in the matter as to which he is to be examined."

In *Sproule v. Samuel*, 4 Scam., 135, it was decided that the

mere fact that one is made a defendant in a bill in chancery, does not necessarily render him an incompetent witness as to matters in which he has no interest.

The same rule is also laid down in *Williams v. Maitland*, Ired. Ch., 92; *Douglass v. Holbert*, 7 J. J. Marsh., 1.

In *Tomlinson v. Spencer*, 5 Cal., 39, this Court decided that the endorser of a promissory note was a competent witness.

It is difficult to see upon what principle, either of law or equity, the Court below was justifiable in excluding the testimony offered.

*J. R. Scott* for Respondent.

The first two errors assigned by appellants will be considered together. It is contended that the Court below erred in refusing the motion of appellants to dismiss the bill, for the want of jurisdiction, and in granting the injunction against Rhodes.

The motion was a joint-motion of Rhodes and Getman, and the appeal is a joint-appeal. Admitting, for a moment, that the defendant Rhodes has some color for such a motion, how can it be contended that his co-defendant, Getman, was entitled to its benefit?

But there was no foundation for the motion. The bill was for the cancellation of a note obtained by fraud, and was in the nature of a bill *quia timet*.

Surely, the cancellation of instruments, obtained by fraud, is a matter of equity jurisdiction. But it is contended, that all the matters set up in the bill, would have been pleaded against a recovery at law, upon the note sued on by Rhodes. To this it is answered:

1. That Getman was not a party to the suit at law.
2. That he was an essential party, as to the perpetration of the fraud.
3. That the facts of his special agency, and his influence over complainant, an ignorant and illiterate man, their long dealings, and the opportunity thereby afforded of committing the fraud, were essentially matters of equity jurisdiction.
4. That Rhodes was a necessary party, as a purchaser with notice, or after maturity, or without a valuable consideration, for the purpose of making the remedy sought complete and perfect.

It is further contended that the bill contains no averment that the complainant is remediless at law, or that the interference of a Court of Equity is necessary to prevent a wrong.

Now what was the remedy of complainant at law? This ability to show the fraud, depended upon a lengthened detail of all the circumstances attending the agency of Getman, who was not a party to the suit—nay, Rhodes had it in his power by taking a nonsuit, to have kept the note *in terrorem* over him for

years, and to have assigned it to third parties, who might have harassed him with suits in remote counties.

It is unnecessary to cite the elementary authorities to sustain the proposition that the jurisdiction of a Court of Equity attaches in all cases where a cloud hangs over a title, or a party because he fears *quia timet*, that he may be injured. All the cases cited by appellants go to establish this doctrine alone: that where a party has a complete, perfect, and adequate remedy at law, that these Courts of Equity will not interfere.

No one disputes that doctrine, and the cases cited contain no other principle.

But had complainant a full, complete, and adequate remedy at law? Then Getman was not a party. True, the defendant Rhodes would have dismissed his suit, and thus defeated a judgment on the merits, and there the note would not have been canceled. The appellants mistake the object of the bill. The injunction was not the relief sought, the cancellation of the fraudulent note was the relief demanded, and the injunction was merely auxiliary.

But this is a joint-appeal, and admit that there was error in granting an injunction against Rhodes, yet that error does not affect Getman—hence, there is no joint-error which can be reversed on the joint-appeal.

2. The third point made by appellants is, that the Court erred in not permitting Getman to be sworn as a witness for his co-defendant, Rhodes.

Though the appellants admit, that the Practice Act forbids that Getman, a party defendant, should be sworn, yet it is deliberately contended that the Practice Act does not bind in a case of equity jurisdiction.

The counsel for respondent has always supposed that the statute of the State had never recognized one rule of law practice and one of equity practice, but that when it was forbidden, for instance, that an Indian, or negro, or a party to a suit, should not in certain cases, be a competent witness, the inhibition applied equally to the District Court, whether sitting as a Court of law or of equity.

But the appellants contend, and cite authorities to prove, that in other States a distinction is observed between law and equity; but it is confidently submitted that there was no statute in the States where these decisions were made declaring the absolute incompetency of a party, as in this State; and hence the authorities have no direct bearing.

But it is contended that Getman was not properly a party, that he was only made so for the purpose of preventing him from being a witness. To have brought the suit against Rhodes alone would have left the remedy incomplete and inadequate,

and equity will not tolerate litigation by piecemeal. 5 Cal., p. 116.

The truth of the whole matter is apparent on the face of the transaction. The complainant simply appealed to a Court of Equity to protect him from a most flagrant wrong, and made the agents connected therewith parties defendant.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

On the tenth of February, 1854, plaintiff executed his note to Getman, due six months after date. On the twentieth of March, 1855, Getman assigned the note, without recourse, to Rhodes, who brought suit on the note in the District Court. Plaintiff then filed his bill in the same Court against the defendants, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled. The plaintiff had a decree, and the defendants appealed.

The first point made by the defendants is, that the Court should have dismissed the bill upon defendants' motion, for the reason that the plaintiff had a complete remedy at law, and should have set it up in defence to the action upon the note.

It is clear that if the remedy of Domingo was complete at law, he had no right to take the case from a jury and bring it before the Chancellor. But was his remedy as complete at law as in equity?

The note was payable to Getman or order, and was assigned by him to Rhodes, after due. It was, therefore, liable to the same defence in the hands of any other party as it was in the hands of Getman. But had the fraud been set up at law, Rhodes could have at once discontinued his suit and kept the note hanging over the maker for years. It might have been assigned to another party, residing in another portion of the State, who could have harassed the maker by a suit commenced in the county where the assignee resided. The case was a proper one for equitable relief. If the facts stated in the bill were true, the maker had the right to have the note canceled, so as to prevent all future litigation.

The cases of *Mitchell v. Oakley*, and of *Perrine v. Sticker*, 7 Palgo, 65 and 598, are not in point for defendants. The last case is an authority to support the view we have taken. The note in the case of *Perrine v. Sticker* was not negotiable, and the suit must always have been in the name of the payee; and, for that reason, he must have always been before the Court as the plaintiff of record, and liable to be examined as a witness.

The second objection made by the defendants is, that the Court erred in refusing to permit Getman to be sworn as a witness for his co-defendant, Rhodes. This objection is not well taken. The point was decided by this Court in the case of *Lu-*

Anthony v. Wessell.

cas, *Turner & Co. v. Payne & Dewey*, (7 Cal. Reports, 92.) If a party be improperly joined as a defendant, the Court or jury, upon application, should first pass upon his case; and, after he is discharged, he could then be examined as a witness for the other defendant.

The third and last objection made by the defendants is, that the decree of the Chancellor was not sustained by the evidence. The testimony was very conflicting, and there was either gross fraud or mistake somewhere. We think the testimony ample to sustain the finding and decree of the Court below.

The judgment is therefore affirmed.

### ANTHONY v. WESSEL.

The title to real estate, sold at sheriff's sale, does not pass until the execution and delivery of the sheriff's deed.

A sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed.

Consequently, where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover.

APPEAL from the District Court of the Fifth Judicial District, County of Tuolumne.

The facts upon which the decision in this case is based, appear in the opinion of the Court.

*L. Quint* for Appellant.

In an action for the recovery of land, if the plaintiff prove no title, the defendant cannot be ousted.

The sheriff who sells under execution is the agent of both parties, but the successor of such sheriff is the agent of neither.

The Court erred in admitting the deed in evidence, as it was not executed by the sheriff who made the sale, and consequently had no more force or effect than if made by a stranger. *People ex rel. Dunn v. Boring, Sheriff of Nevada County*, 8 Cal. R., 406; *Sackles v. H—*, 10 Wend., 562; *Comp. Laws*, p. 718, § 39.

*H. T. Barber* for Respondent.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

It is alleged in the verified complaint, and admitted in the

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answer, that defendant executed a mortgage to plaintiff, which was foreclosed, and the mortgaged premises sold to plaintiff on the 18th day of April, 1853, by Charles K. Swope, then sheriff of Tuolumne county, and a certificate given to plaintiff; and that, on the 17th October, 1856, a sheriff's deed was duly executed to plaintiff, by James M. Stewart, then sheriff of the county aforesaid.

Upon the trial, the plaintiff read the complaint and answer, and then rested; whereupon defendant moved that the case be dismissed, which motion was denied; but the Court required the plaintiff to introduce the sheriff's deed, to which defendant excepted.

The defence is one which this Court would not regard with any favor, as it seems to have been purely technical, and not very conscientious, under the circumstances. But the rules of law are strict, and have been well settled. The plaintiff relied solely upon his legal title, and not upon prior possession. The title was in the defendant until a deed was duly executed by the proper officer. This question has been lately decided by this Court in the case of *Dunn v. Boring*. The new sheriff could not execute the deed. The complaint did not state facts sufficient to constitute a cause of action, and the defendant was not bound to demur. At the trial, the title was in defendant, and of course the plaintiff could not recover. The allegations of the complaint are clear and distinct that the deed was executed by the sheriff who did not make the sale; and the statement, that the deed was duly executed, does not mean that it was executed by the proper officer, but only in the proper manner.

Judgment reversed, and cause dismissed.

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### BIRRELL v. LOUIS SCHIE *et al.*

Where A mortgaged a lot of land for five hundred dollars, and afterwards conveyed the same to B, a *feme sole*, in trust for her children, and A then married B, and the two together borrowed an additional sum, and executed a joint-mortgage for the whole amount, to the assignee of the first mortgage, and the note for the first debt was surrendered, though the mortgage was not canceled; and the debt was again increased, and the last mortgage canceled, and a new one for the increased amount executed by A and B: *Held*, that the holder of the last note and mortgage was entitled to a judgment thereon, and to a decree of foreclosure and sale, for the amount of the first note and mortgage.

APPEAL from the Superior Court of the City of San Francisco.

The facts of this case appear in the opinion of the Court.

*Shafter and Mastick* for Appellant.

If the trust-deed is held invalid, plaintiff is entitled to the whole debt and mortgage-security. But, on the other hand, if the trust-deed is held good, then plaintiff is entitled to the original Walker debt, and the security of that debt.

The deed of trust is inoperative as against us, for it conveys nothing but L. Schie's equity of redemption.

It is a quit-claim, without warranty, and nothing passed but the land, subject to the payment of the debt. *Jackson v. Bradford*, 4 Wendell R., 619. *Qui non habet ille non dat.* 4 Kent's Com., 98.

Louis Schie, when he made the deed of trust, had only an equity of redemption. If he afterwards, by cancellation or release of the Walker mortgage, acquired the fee, this did not vest in the *cestui que trust*, but remains in himself, at least so far as equitable considerations are concerned. *Edwards v. Finch*, 5 Denio, 664-702.

The *cestui que trust* and trustee ought not to set up this deed against us, for they had notice of our incumbrance. Minna Schie, as trustee, is only bound to exercise good faith and prudence in the management of the trust-property. She ought not, thus charged with notice, to be permitted to enact a fraud, for the benefit of either herself or children.

The first and other mortgages were canceled, with a full knowledge that plaintiff relied on all the mortgages as valid. *Cook v. Mancis*, 5 John. Ch. R., 89.

Equity attaches great importance to notice of another's claims or pretensions, and generally charges a party, whether he be a purchaser, or otherwise, who acts regardless of such notice, with all the duties that such claims impose. *Doe v. Rutledge*, Cowper, 713; approved in *Jackson v. Town*, 4 Cowen R., 604; in *Arnold v. Patrick*, 6 Paige Ch., 310; and *Lane v. Ludlow*, cited in note.

The decision of this Court, in the case of *Dillon v. Byrne*, 5 Cal., 445, is precisely in point.

A debt may be kept alive, and a security by mortgage maintained for the debt, notwithstanding the cancellation or destruction of the note. *Dana & Hayden v. Birney et al.*, V. X., 493.

The Court below, in the case at bar, had no evidence before it but the solitary fact of the substitution of note and mortgage, when the intention was most manifest to sustain the lien. *Davis v. Maynard*, 9 Miss., 241; *Watkins v. Hill*, 8 Pick., 522; *Pomerooy v. Rice*, 16 Pick., 24; *Elliott v. Sleeper*, 2 N. H., 525; *Hill v. Bebee*, 3 Kernan, 556-567.

*Bristol & Spencer* for Respondents.

The case of *Dillon v. Byrne*, 5 Cal., 455, cited by appellant, is not in point. In that case, a part of the mortgage-debt was the purchase-money of the land, and to that extent, and no more,

the Court allowed the mortgage to be foreclosed. This was allowed, on the ground that Dillon had a lien independent of the mortgage.

If the trust-property should be sold, under a decree of foreclosure, in this case, the purchaser would take with notice of, and would be bound to carry out, the trust. 1 Story Eq. Juris., § 533.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

This was a suit to foreclose a mortgage.

The facts are substantially these:

1. On the second day of February, 1852, Louis Schie borrowed of William Walker five hundred dollars, and to secure the same, executed a note and mortgage.

2. On the twentieth of November, 1852, Walker assigned the note and mortgage to Anton Mengers.

3. On the first of December, 1852, Mengers made a further advance of two hundred dollars, and took from Louis Schie and Minna Hirsch a new note and mortgage, for seven hundred dollars, at the same time surrendering the note of five hundred dollars to Louis Schie, but leaving the first mortgage uncanceled.

4. On the third of June, 1853, the note for seven hundred dollars was delivered up to Schie, and the mortgage to secure it duly canceled of record, and, in place of that mortgage, a note and mortgage for eight hundred dollars were executed by Louis Schie and Minna Schie, now his wife, to Andrew Birrell, the plaintiff, he having purchased the note and mortgage for seven hundred dollars. The note and mortgage to Birrell were given to secure him for the money so secured by the Mengers note and mortgage.

5. On the thirtieth of January, 1854, plaintiff having previously had other transactions with Louis Schie, took from him and wife another mortgage, for thirteen hundred dollars, which sum included the amount of the previous note and mortgage for eight hundred dollars, which were both then canceled.

6. On the fourth day of November, 1852, while the note and mortgage to Walker were unpaid, the defendant Louis Schie conveyed the premises to Minna Hirsch, then sole, but now the wife of Louis, in trust for her two infant children.

7. The defendant Minna Schie resists the foreclosure of the mortgage, upon the ground that the entire interest in the property is in her as trustee for her children.

8. The Court below gave plaintiff a judgment against Louis Schie, for the amount of the note and mortgage, but refused to make a decree for the foreclosure of the mortgage and a sale of the property, and the plaintiff appealed.

The decision of this Court, in the case of *Dillon v. Byrne*, (5 Cal., 455,) is decisive of this case. It is true, there are some slight differences in the facts of the two cases, but the essential principle is the same. In this case, as in that, the land was charged with a debt when the conveyance was made to Minna Hirsch, of which she had due record notice. The fact that the Mengers mortgage was canceled of record, is no evidence of any intention to abandon the lien, for the reason that the new note and mortgage to plaintiff, executed the same day, constituted a part of the same transaction, and must be taken and construed together with the acknowledgment of satisfaction of record. This acknowledgment of record was only evidence of the intention of the parties that the mortgagor should not be held for double the amount. It was evidence only of an intention to merge one in the other, but not of payment.

The plaintiff was entitled to the judgment given, and to a decree of foreclosure and sale for the amount of the first note and mortgage.

The judgment of the Court below is reversed, with direction to enter a decree in conformity with this opinion.

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WARE *et al.* v. ROBINSON *et al.*

An appeal will lie from a judgment or order putting a party in contempt.

The provision of the Practice Act authorizing judgment, personal and final, against an absent defendant, for whom the Court has appointed an attorney, with privilege to the defendant to come in and deny in six months, is not in violation of the Constitution of the United States or of this State.

APPEAL from the Superior Court of the City of San Francisco.

The facts of this case appear in the opinion of the Court.

*Hoge & Wilson* for Appellants.

A garnishee has the right to inquire into the validity of the previous proceedings in the case. It is a duty which he owes to his creditor and himself, as it would be no bar to a subsequent recovery if he should permit judgment to go against him on an attachment that is absolutely void. *Ford v. Hurd*, 4 Sme. & Mar., 684; *Pierce v. Carlton et al.*, 12 Ill. R., 363.

Did the proceedings had in this case authorize the appointment of an attorney to appear for the defendant? §§ 30, 31, Prac. Act.

The appointment of an attorney is intended as a substitute for publication. Unless there is a case for publication made by the affidavit of Osborn, there is no case for appointing an attorney.

But we contend that the statute allowing the Court to appoint an attorney in lieu of publication, is unconstitutional and against the great principles of free government. It violates the principle that no man shall be deprived of his property, etc., "unless he be duly brought to answer, and be forejudged by course of law." 1 Black. Com., 139; Con. of Cal., Art. I, § 8; 3 Peters' Cond. R., 312; Bloom v. Burdick, 1 Hill R., 139; Starbuck v. Murray, 5 Wend., 156, 157.

"To bind a defendant personally, by judgment, when he was never personally served, or had notice of the proceedings, would be contrary to the first principles of justice."

So it was decided in Fisher v. Lane, 3 Wils., 297. In Phelps v. Holker, 1 Dallas, 261, a judgment under like circumstances was held in Penn. not binding and conclusive. In Kibbe v. Kibbe, (Kirby, 119) the Supreme Court of Connecticut went further, and denied operation to a judgment so obtained in Massachusetts. The English Courts have established the same rule. Buchanan v. Bucker, 9 East., 192; Kilburn v. Woodworth, 5 John. R., 40; Aldrick v. Kinney, 4 Conn. R., 386; Hitchcock v. Aicken, 1 Caines, 460; Robinson v. Ward, 8 John., 86; ib. 194; 13 John., 192; 15 ib., 121; Russell v. Briggs, 9 Mass., 462; Jacob v. Hill, 12 Mass., 25; Bushard v. Gates and wife, 4 Dana, 435; Boswell, lessee, v. Otis et al., 9 How. U. S., 350; Sheaffer v. Gates et al., 2 B. Mon., 455; Lessee of Payne v. Moreland, 15 Ohio, 444.

The right to obtain a judgment personally, without service of process or notice in same form, must not be confounded with proceedings *in rem*.

In the latter, the thing is levied on and pursued. Jurisdiction is acquired by levying on the thing, and, having once acquired jurisdiction, any further irregularities are merely matters of error. In most, if not all the States, proceedings in foreign attachments are proceedings *in rem*. The judgment only goes, in the absence of an appearance or defence, against the property attached. The want of notice is merely error, because it is a part of the proceedings after jurisdiction is acquired by service on the property. Such a judgment, whilst it may be reversed on direct appeal or writ of error, is conclusive in all collateral proceedings. Vorhies v. Bk. U. S., 10 Peters, 449, 468; Kilburn v. Wordsworth, 5 John., 40; Aldrich v. Kinny, 5 Conn., 386, 387; Kellog ex parte, 6 Vt., 509.

In the case at bar the question is as to jurisdiction of the person, so as to authorize a personal judgment, irrespective of property. 4 Cra., 278; 1 Paine C. C. R., 626; 12 Serg. & Raw., 289.

The case of Flint River Steamboat Company v. Foster, 5 Geo. R., 194, is relied on by respondent. This case was a proceeding *in rem*, a quasi admiralty proceeding.

The fact that our statute allows a party to come in within six

months and have a judgment opened up, does not strengthen the case where the defendant is not presumed to know, and has no means of knowing, by publication or otherwise, that a judgment has been rendered against him.

*W. K. Osborn* for Respondents.

The respondents insist, that this appeal should be dismissed for want of proper parties, and for the further reason, that no appeal lies from the order of the Superior Court herein appealed from.

Section 335 of Practice Act, provides, that "any party aggrieved may appeal in the cases prescribed in this title," and section 347, "an appeal may be taken from the District Court and Superior Court of the city of San Francisco, in the following cases: first, from a final judgment rendered in an action, or special proceeding commenced in those Courts, or brought into those Courts from another Court; second, from an order granting or refusing a new trial; from an order refusing to change the place of trial, etc.; from an order granting or dissolving an injunction, and from any special order made after final judgment."

These appellants are not parties to the original action, and therefore cannot appeal from the judgment, or any special order made after final judgment in the action. And even if the proceedings herein, supplementary to execution, be considered as a special proceeding in the nature of an action against the appellants, as this Court would seem to hold in the case of *Adams v. Hackett & Casserly*, January Term, 1857, then no final judgment in such special proceeding has yet been had, and the appeal is taken in the very threshold of the proceeding.

If appeals are allowed in such cases as the present, an appeal may be taken at every step in an action, and there will be no end of litigation. (See *Moraga v. Emeric*, 4 Cal., 308.)

It is contended, by counsel for appellants, that so much of section thirty and thirty-one of Practice Act, as authorizes a judge, in actions upon contracts for the direct payment of money, where it shall appear by affidavit to his satisfaction that a cause of action exists, and that the defendant is concealing himself to avoid service of summons, to appoint an attorney to appear for the concealed defendant, and conduct the proceedings, on his part, is unconstitutional.

In the case of *Bates v. Delevan*, 5 Paige Ch. R., 305, the Court say, "By the *lex loci rei citæ*, property belonging to a person who is not within the jurisdiction of a Court of Law or Equity, may be made subject to the jurisdiction of the Court, so as to render the judgment or decree of such Court binding as a proceeding *in rem* against the property which is within its jurisdiction." Cases to the same point might be quoted from the law reports of nearly every State in the Union. See, for example, 1 Hill, 130 ;

2 Hill, 64; 5 Johns., 37; 1 Dallas, 261; 6 Pick., 282; 11 Mass., 507; 1 N. H., 542; 2 Vt., 268; 4 Conn., 380; 2 Leigh, Va., 172; and other cases innumerable; all of which agree to support the proposition, that Courts of Law and Equity may have jurisdiction of the subject-matter of a suit, and render a judgment binding on the property of the party defendant, even though they have not jurisdiction of the person for want of personal notice.

The mode of proceeding by which such jurisdiction may be had, must be left to the legislative authority of each sovereignty. In *Beech v. Abbot*, 6 Vt., 591, the Court hold, "it is undoubtedly competent for the Legislature to prescribe such mode of judicial procedure as it may deem proper; to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pursuance of such notice. See, also, *Douglass v. Forrest*, 4 Bing., 686, per Best, J.

However hard may be the operation of the law in individual cases, the Court will not, therefore, pronounce the law unconstitutional or void.

In *Bennet v. Boggs*, 1 Bald., 74, the Court say, "we cannot declare a legislative act void because it conflicts with an opinion of policy, expediency, or justice. We are not guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance." "Now, although as a general rule, a defendant must have notice, actual or constructive, otherwise no valid judgment can be rendered against him, yet the Legislature may dispense with notice, and further, notice before judgment is not essential when the statute provides specific modes of relief."

Chief Justice Marshall says, in *Mode v. The Deputy Marshal of Virginia*, 1 Brock., 334, "it is a principle of natural justice, which Courts are not at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard."

Again, from Cowen and Hill's *Notes to Phillips' Evidence*, vol. ii, 192, "Personal notice is not always necessary. The Legislature may prescribe what notice shall be sufficient." See, also, *Owner et al. v. Mayor of Albany*, 15 Wend., 374, *Sharp v. Pratt*, ib., 610, 613.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The plaintiffs commenced their action, upon a promissory note, against Swedenstierna, in the Superior Court of San Francisco. The summons was returned, without service, and the attorney of the plaintiffs made affidavit that he was informed and believed that Swedenstierna was then in the State, and concealed himself to avoid the service of process. The Court, thereupon, made an

order appointing an attorney to appear for Swedenstierna. The attorney appeared, and put in a *general* denial; and judgment was rendered for plaintiffs. Upon this judgment execution was issued, and the attorney of the plaintiffs made affidavit that he was informed and believed that Robinson and Devoe had property of Swedenstierna's in their possession. An order was made by the Court, requiring the garnishees to appear and answer before the referee named in the order. They appeared, but refused to be examined, upon the ground that the Court had no jurisdiction of the person of Swedenstierna, and therefore the proceedings were void. The referee reported the fact to the Court; whereupon the Court adjudged the said Robinson and Devoe guilty of a contempt of Court, from which they appealed.

The learned counsel of the plaintiff asks this Court to dismiss the appeal, upon the ground that this was a case of contempt, from the decision of which no appeal will lie. This objection does not seem to be well taken. This question was very fully considered in the several cases of E. A. Rowe on *habeas corpus*, January Term, 1857.

Coming, then, to the merits of the case, the learned counsel for Robinson and Devoe insist that that portion of the thirty-first section of the Practice Act, allowing the Courts to appoint attorneys for defendants, in lieu of publication, "is unconstitutional, and against the principles of a free government."

The Constitution of the United States, and the Constitution of this State, both provide that no person shall "be deprived of life, liberty, or property, without due process of law."

Whether this restriction applies as well to the Legislature as to the judiciary, it is not now necessary to determine, as the question is not involved in this case. If the personal judgment, in cases like this, was intended by the code to be final and conclusive, under *all* circumstances, after the expiration of six months, then its constitutionality might admit of very grave doubt. But we cannot think such was the intention of the Legislature.

It is true that the judgment is, in form, personal and final, and that the code, section sixty-eight, authorizes the Court, upon such terms as may be just, to allow the defendant, at any time within six months, to answer to the merits of the *original* action. Under the theory of the Practice Act, the defendant, when summoned in the manner prescribed, is as duly brought into Court as if personally served with the summons; and, as a legitimate result of being legally in Court, unless he denies the allegations of the complaint, within six months, he is held to admit them to be true, and cannot afterwards show their falsity.

But this theory of the code, as applicable to *this* case, proceeds upon the ground that the defendant was in fact within this State, and *concealed* himself to avoid the service of process. The affida-

vit is only *prima facie* evidence of these facts. If untrue in point of fact, the defendant could at any time institute his suit to set aside the judgment, upon the ground of fraud. This fraud is not found in the cause of action, as set forth in the complaint, but in the manner of bringing the defendant into Court. Upon a false state of facts, as to the grounds upon which the service of process has been dispensed with, the plaintiff has obtained a judgment in his own wrong, and that judgment cannot be permitted to stand. Like any other judgment obtained by fraud, it may be set aside. But when the facts of residence and concealment do exist, then the defendant has no right, after the expiration of the six months, to question the truth of the allegations of the complaint. He is deemed to be in Court, under such a state of circumstances, and must be held to know the allegations of the complaint, and to admit them to be true, in the same manner as if personally served with the summons. When he in fact conceals himself, to avoid the service of process, he cannot complain of the want of such service, when he has, by his own act, prevented it. The plaintiff has a right to the service of process, and he cannot be deprived of this right by the act of the defendant, who voluntarily puts himself beyond the reach of process, with the criminal *intention of avoiding it*.

The judgment in this case was good, until set aside for legal cause, and the garnishees should have answered. The order of the Court below is therefore affirmed.

### THE PEOPLE *ex rel.* BOSQUI v. CROCKETT *et al.*

A railroad company cannot refuse to enter the transfer of stock in said company, on their books, on the ground that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock, at the date of its transfer.

A by-law, passed two days after such transfer, to the effect that no transfer of stock should made upon the books of the company, until all indebtedness of the assignor was paid, would not give the company such lien, or a right to refuse to enter the transfer on their books.

The company had a right to pass such by-law, to operate prospectively. *Quære*, would such by-law affect subsequent purchasers without notice?

APPEAL from the District Court of the Twelfth Judicial District, City and County of San Francisco.

The facts of this case appear in the opinion of the Court.

*Crockett & Page* for Appellants.

The only question is, whether the by-law of the company had such a prospective effect as to be operative against assignments of stock already made, by an endorsement on the certificate?

For a full and satisfactory exposition of the law on this subject, and a collection of authorities, we refer to Angell & Ames on Corp., §§ 353-357.

But it is not the general law only, by which the question is to be decided, as our statutes and decisions have much to do with it, and, in our opinion, are conclusive on the point. See Railroad Law, § 20, Session Acts, 1854, p. 173.

The company were not affected by the assignment to plaintiff. The transfer of the stock was not good, or complete, except as between the parties, until the entry on the books of the company. The assignment was a nullity, so far as they were concerned. They had the same right to deal with Palmer's stock, as if he had not assigned it. *Weston v. Bear River and Auburn Water and Mining Company*, 5 Cal., 186.

It was the duty of Bosqui, before taking the stock, to ascertain if the company had any lien upon it, and, not having done so, he cannot complain.

*Shafter, Park & Shafter, for Respondents.*

The corporation had no power to pass the by-law in question, for the reason that all the conditions of an operative transfer are prescribed in the charter itself.

The cases in which it has been held that there could be no transfer, until the debts of the assignor to the company had been paid, have gone on the grounds: first, that there was a provision to that effect in the charter itself; second, on the ground of a by-law to that effect, the charter turning the entire subject of transfer over to the corporation, to be regulated by it.

In the charter of the Sacramento Valley Railroad Company, neither one of the predicaments is true. The mode and rule of transfer are prescribed in the charter, and nothing is left for the corporation to do. Acts of 1854, p. 84, § 20.

It has been suggested that the provision in section twenty, that transfers shall not be valid, except between the parties thereto, until the same shall have been entered on the books of the stockholders, "carries with it a power to the corporation, to subject the right of transfer to restrictions cumulative to those named in the charter."

The answer is, that the words quoted are not words of grant. This section does not profess to treat of corporate powers, or the powers of the directors. That subject is taken up and exhausted, in section fourteen.

Section twenty provides, in effect, that shares may be transferred before the instalments on them have been paid. The by-law says they shall not be.

"May" has the force of "shall," whenever the rights of the public, or third persons, are concerned. *Newburgh T. Co. v. Miller*, 5 John. Ch. R., 112.

The clause of section twenty contemplates merely a system of registration, so the officers of the corporation may know who are entitled to vote, and who are entitled to dividends, and for the benefit of the creditors of individual stockholders, as was held in *Weston v. The Bear River Co.*, April T., 1855.

The power to make by-laws, contained in the fourteenth section, is so limited by that section, that a by-law opposed to the charter would be void.

It appears that the stock was transferred to Bosqui on the twenty-eighth day of January, 1857, and that the by-law in question was not passed until the thirtieth day of that month.

Retrospective and *ex post facto* by-laws are void at common law. Angell & Ames, 3 ed., p. 385; 1 Keble, 733; *Howard v. Scannell*, Charl., (Ga.), 173.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

*Mandamus*, to compel defendant Crockett, as president, and Payson, as secretary, of the Sacramento Valley Railroad Company, to transfer to the relator, on the books of the company, one hundred and twenty-seven shares of stock.

On the twenty-eighth day of January, 1857, W. A. Palmer was the owner of the shares, and on that day transferred them to the relator, for a valuable consideration. Previous to the assignment, Palmer had executed to the company his note, for five thousand five hundred and seventy-three dollars and eighty-one cents, which was still unpaid. On the thirtieth day of January, 1857, the board of directors passed a by-law, to the effect that no transfer of stock would be made upon the books of the company, until all indebtedness of the assignor had been liquidated. On the sixth day of February, 1857, the relator requested a transfer to be made to him, which was refused by the company, except upon condition that the relator would pay the note of Palmer. The District Court ordered a peremptory mandate, and the defendant appealed to this Court.

The twentieth section of the amendatory act of 1854, page eighty-four, provides that transfers of stock may be made by endorsement and delivery of the certificates, signed by the proprietor; "but such transfer shall not be valid, except as between the parties thereto, until the same shall have been entered in the book of stockholders."

The only question in the case, arising under this provision, and the former adjudications of this Court, is, whether the company had any interest in, or lien upon, the stock, at the time the transfer was made. The transfer is only invalid as against a third party, who has some legal and valid existing claim upon the property. If the company had no such interest, then the transfer was good as between the parties, and, being good as be-

tween them, the company could not rightfully object to the demanded transfer.

The company had no lien by express agreement, or by its charter; and no lien could exist at common law. (Angell & A. on Cor., §355.) How, then, did the company acquire the alleged lien? The by-law was passed two days after the transfer. Could it have a retrospective operation? We think not.

Under the provisions of the fourteenth section, the board had the right to pass such a by-law, to operate prospectively. But whether such a by-law would affect even future purchasers of stock, without notice, is a question not arising in this case. When the charter itself does not give the corporation this lien, and when the purchaser has no notice of the by-law, it has been much doubted whether the lien of the company can be sustained. (6 Pick., 329; 1 Harrington's Del. Rep., 27; 8 Ser. & R., 73.) In the case of *Tuttle v. Walton*, (1 Kelly's Ga. Rep., 43,) where the liability of the stockholder was stated in the certificate, and was created by an express by-law, the lien of the company, for debts due to it, was sustained against a subsequent purchaser having notice.

Our conclusion is, that the company, at the date of the transfer, had no vested interest in the stock; and that the by-law, passed afterwards, could have no retrospective operation. The right of the relator to the transfer had, therefore, attached before the passage of the by-law, and could in no way be affected by it.

Judgment affirmed.

## THE PEOPLE v. JOHN GALVIN.

It is no error for the Court in a criminal case to set a day for pronouncing sentence, in the absence of the prisoner. It is only requisite that he should be present when the sentence is pronounced.

The reading of the statute law and decisions of the Supreme Court to the jury, without exceptions taken, is no ground of error.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

The facts of this case appear in the opinion of the Court.

*Rowe & Mott* for Appellant.

The Court erred in reading the law to the jury.

The statute contemplates that all the Court says to the jury shall be in writing, so that there may be no mistake as to what is said. Laws of 1855, 275; Wood's Dig., 298, § 1622.

The Court erred in changing the time for pronouncing sentence when the defendant was not in Court.

*Thomas H. Williams, Attorney-General, for the People.*

The object of the Legislature in requiring the instructions of the Court to be in writing, was simply to have a record of the same. The statute is as well complied with by printed as by written instructions, and as to whether the printed matter is in a book or upon a loose piece of paper is certainly immaterial, the end being the same. In either case the law is complied with.

As to construction of statutes, see 3 Cowen, 96.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an indictment, trial, and conviction for murder in the first degree. Upon the trial, the defendant moved for a continuance, upon affidavit containing the names of the absent witnesses and the facts expected to be proved by them. The Court refused the continuance, but permitted the defendant's counsel to read the affidavit in evidence to the jury. Several errors have been assigned by the counsel of defendant.

The main point made by the counsel of defendant is, that "the Court stated to counsel for the defendant, and in presence of the jury, that, if the witnesses named in the affidavit of the defendant were present, and deposed to the statements therein contained, it would be no legal defence; that it would only amount to a plea of insanity; and that the statute provided specially for such cases when the act was committed by persons of unsound mind."

It is unnecessary for us to determine whether such a remark by the Court to the counsel, in the presence of the jury, be erroneous or not, as no exception was taken to it at the time, and the instructions afterwards given to the jury are not contained in the record. We are bound to presume that the error, if any, was cured by the instructions afterwards given by the Court. It is stated in the record that all the written instructions asked by the prosecution and by the defendant's counsel were given by the Court.

It is also objected that the Court, of its own motion, read certain sections of the statute, and a portion of the decision of this Court in the case of Moore, to the jury, as instructions, without exception or objection on the part of the defendant's counsel. We can see no ground of error in this.

The defendant's counsel further object, that the Court below set the day for pronouncing the sentence when the defendant was not in Court. This, we think, was not error. It was only necessary for the defendant to be personally present when judg-

ment was pronounced; not when the day was appointed for pronouncing it. (Wood's D., 305.)

We can see no error in the record, and the judgment of the District Court is therefore affirmed.

### KNIGHT v. FAIR.

A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the creditor does not divest the lien. He may be both a creditor and a purchaser, and still have a *prior* lien to that of the redemptioner. This can only be on the principle that the legal estate is still in the judgment-debtor, until the delivery of the sheriff's deed.

In all cases where a mere lien exists, the legal estate must be in some other party than the mortgagee. This legal estate, and the consequent right to discharge the lien and save the estate, is of value, and can be sold.

APPEAL from the District Court of the Ninth Judicial District, County of Siskiyou.

The facts appear in the opinion of the Court.

*J. A. Fletcher* for Appellant.

The sum of \$472, paid to the sheriff, was not sufficient. It should have been \$1,014 35.

The \$271 13 paid to the clerk should have been paid either to the purchaser or sheriff. Wood's Dig., § 231-2-3; Vandyke et al. v. Harmon & Barton, 3 Cal. R., 295; The People ex rel. Dunn v. Boring, sheriff, Oct. T., 1857.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

Application for *mandamus* to compel sheriff to make a deed to the purchaser of real estate.

Knight obtained a judgment against Calham and others, for \$637 58, with interest at five per cent. per month, and for \$349, with interest at ten per cent per annum, and \$150 90 costs, on May 29th, 1856; making in all \$1,137 48. On the 4th June, 1856, there was paid the sum of \$491 10, after deducting sheriff's costs, \$88 90, for collection, leaving the sum of \$646 38. July 23, 1856, the sheriff sold the real estate to Knight for \$400. On the 23d January, 1857, the successor in interest paid to the sheriff \$472, and to the clerk \$271 13, making in all the sum of \$743 13, for the purpose of redeeming the property. The purchaser refused to accept the same as sufficient, and applied for this writ to compel the sheriff to make him a deed. The writ was denied, and the plaintiff appealed.

The two hundred and thirty-first section of the Code allows the judgment-debtor, or a redemptioner, to redeem within six months after the sale, by paying the purchaser the amount of his purchase, with eighteen per cent. thereon, in addition, together with any assessments or taxes, and interest on such amount; "and, if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien, with interest."

It is certain, from this explicit language, that the *purchaser* may have a *lien* upon the property *prior* to that of the redemptioner. The fact that he is the *creditor* does not divest his lien. He may be both a creditor and a purchaser, and still have a *prior* lien to that of the redemptioner. This can only be upon the principle that the legal estate is still in the judgment-debtor, until the delivery of the sheriff's deed; and, if in the debtor, it is such an estate as may be the subject of a lien, a sale under execution, or of a conveyance by deed from the debtor. In fact, it may be laid down as true, that in all cases where a mere lien exists, the legal estate must be in some other party than the mortgagee. This legal estate, and the consequent right to discharge the lien and save the estate, is of value, and can be sold.

We are compelled to give the statute this construction. If we do not, it has no meaning. This was expressly decided by this Court in the case of *Van Dyke v. Herman & Barton*, (3 Cal. R., 293.)

In this case, when the several payments were made upon the judgment, there were no directions given by the defendants as to the manner in which they should be applied; and the plaintiff, therefore, had his election, and applied them as follows: first, to the payment of the costs; second, to the payment of that part of the judgment drawing ten per cent. per annum; third, to the payment of that part of the judgment drawing five per cent. per month; applying the payments in this way, the amount tendered was not sufficient, as will be seen by this calculation, which is substantially accurate.

|   |          |
|---|----------|
| Amount due July 23d, 1856, - - - - -                      | \$646 38 |
| Two months' interest on \$637 58, five per cent., - -     | 63 75    |
|   | <hr/>    |
|   | \$710 13 |
| From which deduct amount bid, - - - - -                   | 400 00   |
|   | <hr/>    |
|   | \$310 13 |
| Interest at five per cent. per month, from July 23, 1856, |          |
| to January 23, 1857, being six months, - - - -            | 93 00    |
| Amount of bid, and eighteen per cent., - - - -            | 472 00   |
|   | <hr/>    |
| Carried forward, - - - - -                                | \$875 13 |

*McGreary v. Osborne.*

|                            |          |
|----------------------------|----------|
| Brought forward, - - - - - | \$875 13 |
| Amount tendered, - - - - - | 743 00   |
| Balance, - - - - -         | \$132 13 |

The judgment is reversed, and cause remanded.

*MCGREARY v. OSBORNE et al.*

A tenant who puts up machinery for a mill, in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but as between vendor and vendee, such machinery would be considered as a part of the realty.

The evident intention of the act, in relation to mechanic's liens, was to give mechanics and artisans a lien for all work done by them, upon any description of property. The first section gives a lien upon the superstructure itself, as distinct from the land; and the fourth section gives a lien also upon the land, when the same is owned by a person who caused the superstructure to be erected.

The object of the act was to give the mechanic a lien upon whatever interest the person who caused the superstructure had, and which could be sold under execution.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action to enforce a mechanic's lien. The facts appear in the opinion of the Court.

*McDougall & Sharp* for Appellants.

The property upon which a lien is claimed by plaintiff in this action, is personal property, and cannot be the subject for a lien for repairs, except whilst in the possession of the mechanic or artisan who made the repairs; as provided in section ten of the mechanics' lien law.

In this case there is no pretence that the machinery has been in possession of plaintiff since the completion of the work.

The lien claimed is simply on the mill and machinery, and not on the building and ground, although the machinery is fastened to the building by nails, bolts, screws, etc.

The law of fixtures has been materially modified in favor of trade and manufactures, etc. It is not claimed and should not be maintained by Dore & Ross, that the mill or machinery is a fixture, as between Dore & Ross, the landlords, and defendants Rankin & Beach, the tenants, or that the tenants could not remove the mill at the expiration of any month, or at the termination of the lease. In *Lawton v. Lawton*, 3 Atkins, 13, Lord Hardwicke discusses the law of fixtures, and determines that fire-engines, vats, brewing-vessels, and other machinery,

though annexed to the freehold, yet as they are laid for the convenience and promotion of trade and manufactures, the landlord cannot retain them, and the tenant can remove them at the expiration of the lease. See, also, 1 Atkyns, 477; 17 Johnson, 121; 14 Mass., 356; Toll Law of Executors, 96; 6 Johnson, 5; 20 Johnson, 29.

If the mill and machinery be considered real property, or a fixture, then the plaintiff can have no lien, because, to be a fixture, it must be a part of the realty, or the building in which it is situated; how then can the plaintiff have a lien upon the mill, a part of the land and building, and not upon the land and building itself. Suppose he had a lien, and should get a judgment of foreclosure, and sell the mill and machinery, what rights would the purchaser acquire? Could he use possession, and enjoy or remove the mill, a part of the realty, without being a trespasser upon the owner of the fee? Again, Dore & Ross are the owners of the realty, and not parties; can the plaintiff foreclose and sell a part of the realty without making the owners parties? We think not. The plaintiff's lien, at the most, could only bind the interest of Osborne. Statutes of 1856, page 204, § 4; *Bottomly v. Grace Church*, 2 Cal., 90; *English et al. v. Foote et al.*, 8 Sm. & Mar., 444; *Gray v. Caviere*, 5 Cal., 511.

Mechanics' lien law is in derogation of the common law, and must be strictly construed. *Bottomly v. Grace Church*, 2 Cal., 90.

#### A. H. Hitchcock for Respondent.

The law respecting liens upon personal property, does not apply to fixtures and superstructures erected for the purpose of trade and manufactures, and which are *quasi* movable, and may be removed by the tenant.

The lien law has been amended from time to time, and the object of the law, as it appears by the amendments, is to give mechanics and material men security for labor done and materials furnished, in every conceivable case. The first law was enacted in 1850, (Compiled Laws, 808,) and gave a lien on buildings and wharfs. In 1853, a supplementary act was passed (Compiled Laws, 811,) by which a lien was given in certain other cases therein specified. The law, up to this time, however, was very limited in its operation. It was again amended, (Session Laws, 1856, p. 203,) and among other things, the very comprehensive word superstructure inserted; so that in addition to the "building and wharfs," a lien was also given upon superstructures. § 1, *ib.*

Section one gives to all artisans, etc., a lien for repairs, etc., on any building, wharf, or structure, without any qualification. Section four, *ib.*, further, and in addition to a lien on the building or superstructure, gives a lien on the land on which the

building or superstructure is erected, if at the time the work, etc., was done, they, the land and superstructure, belonged to the same person. The same section, in addition to the lien on the building or superstructure, gives a lien, also, on the interest which the person had in the land, if less than a fee-simple, who caused the building or superstructure to be erected.

A superstructure, therefore, by this statute, may be a part of the freehold, and subject to the laws that govern freeholds, as when it is affixed thereto, and is the property of the owner of the land. 2 Kent Com., 343.

It may be a tenant's fixture, erected for the purposes of trade or manufacture; in which case it is personal property, and *quasi* movable. 2 Kent Com., 343, 339.

This is the case now before the Court. The only interest that Osborne had in the land on which the mill was erected is a tenancy; the mill, consequently, is a superstructure, erected for the purpose of manufacture; and in addition to the lien which we have in the mill, by section four, we have also a lien on the lease by section four.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Dore & Ross leased to Rankin & Co. a frame building, resting on piles driven into the earth. The basement floor was on the ground; and in this building Rankin & Co. put up machinery for a steam flouring-mill. The frame in which the machinery was placed was supported by props from the basement story, and was also fastened to the building by screws, bolts, and nails. During the continuance of the lease, Rankin & Co. sold the property to Osborne for \$7,000, he paying down \$3,000, and executing his promissory notes for the balance. In the written contract of sale executed by all the parties, it was stipulated that Osborne was to have immediate possession; and, upon payment of the note, Rankin & Co. were to execute a bill of sale. In case Osborne failed to pay any of the notes, Rankin & Co. were authorized to take possession of the property and sell it, paying any surplus that might remain after discharging the notes to Osborne. While Osborne was in possession, and before any one of the notes became due, he employed the plaintiff to repair the machinery. After the repairs were made, Osborne sold to Veatch, and he to Rankin & Co., who executed a new contract of sale to Veatch. This suit was brought to recover the amount due for work and labor, and to enforce a mechanic's lien upon the machinery. The plaintiff had judgment in the Court below, and the defendants appealed.

The rule in reference to fixtures is applied with different degrees of strictness as between different parties. (2 Kent, 345.) As between the landlords and tenants in this case, there would

seem to be no doubt as to the right of the latter to remove the machinery. But, as between vendor and vendee, the machinery would be considered as part of the realty. (2 Kent, 346, and authorities there cited.)

The first section of the act of April 19th, 1856, gives mechanics and others, for work and labor, or materials furnished, for the construction or repairing of any building, wharf, or other superstructure, a lien upon such building, wharf, or superstructure, for the work and labor done, or materials furnished. The fourth section goes further, and also gives a lien upon the land, if at the time the land belonged to the person who caused the superstructure to be erected. The tenth section gives mechanics and artisans a lien upon personal property made, altered, or repaired by them, with the right to retain the possession until payment.

Putting these different provisions together, the evident intention of the act was to give mechanics and artisans a lien for all work done by them upon any description of property. The first section is very broad, and gives a lien upon the superstructure itself, as distinct from the land; and the fourth section gives a lien also upon the land, when the same is owned by the person who caused the superstructure to be erected. The object of the act was to give the mechanic a lien upon whatever interest the person had who caused the superstructure to be made. If the party owned only the superstructure, then the lien would only attach to that; but if he also owned the land, the lien would also embrace it. And any interest in land which could be sold under execution would be the subject of such a lien.

Unless we give the act this construction, we must do manifest injustice to the language of the first, fourth, and tenth sections. It may often happen that the ownership of the superstructure may be in one person, and that of the land in another. (5 Mass. R., 487; 8 Mass. R., 282; 3 Kent, 487, note.) From the *quasi* movable character of the property involved in this case, the plaintiff could not take and keep possession of it, as of that kind of personal property mentioned in the tenth section. This state of the case was foreseen by the framers of the act; and, therefore, the lien was given upon the superstructure itself, as distinct from the land.

It is very justly contended by the counsel of defendants, that Osborne could do no act to affect the rights of Dore & Ross, or those of Rankin & Co. The latter had agreed to sell their interest to Osborne, and had placed him in possession; and, under the stipulations contained in the written contract executed by Rankin & Co. and Osborne, the remedy left Rankin & Co., upon non-payment of the balance of the purchase-money, was a sale of the property. Osborne had the right to insist upon a sale, and the payment of the surplus proceeds, if any, to him. This right existed in Osborne at the time the work was done, and the

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*Bellos v. Rogers.*

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lien attached upon his interest. Those who purchased afterwards took subject to the lien.

Judgment affirmed.

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### BELLOC *v.* ROGERS, ADMINISTRATOR, *et al.*

Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons, and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit.

A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when a District Court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief; and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and Probate Court, and allowed, it is otherwise.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The facts appear in the opinion of the Court.

*Daniel Rogers* for Appellant.

*Halleck, Peachy & Billings, and Gregory Yale*, for Respondents.

In this case the equity of redemption had passed from the mortgagor to the purchasers, under the foreclosure of the second mortgage, and the administrator was made a party, solely on the ground that the complaint asked for a judgment against the estate of Saroni for the deficiency.

By section two hundred and sixty of the Practice Act, a mortgage, it is declared, should not be deemed a conveyance, whatever may be its terms, so as to enable the mortgagee to recover possession of the mortgaged premises without a foreclosure and sale; and by section two hundred and forty-six, the Court has power by its judgment to direct the sale of the property. After the time for redemption expires, the purchaser is entitled to the sheriff's deed. That deed divests the equity in the mortgagor, and vests it in the purchaser. In this case, the second mortgagees were the purchasers.

The practical difficulty resulting from a sale under an order of the Probate Court, is, that the administrator executes a deed after the confirmation of the sale by the Court, the terms of which are limited and restricted by the statute. The deed shall be deemed to convey all the right, title, interest, and estate, of the testator, or intestate, in the premises at the time of his death. (§ 172 of act relating to estates, as amended by the

act of February 1st, 1856.) Such a deed could not convey the interest of the mortgagor at the date of the mortgage. The plaintiff is entitled, to the extent of his contract, to a lien on the land from the date of the mortgage. In this case the second mortgagee would cast out the rights of the plaintiff under the first.

The administrator cannot extend the terms of the lien, beyond the limitation fixed by the statute under which he acts. The second mortgagees are now in possession under the purchase at the sale subject to the first mortgage. How could they be ejected, under such a deed from the administrator?

As to the effect and operation of an administrator's deed, counsel refers to brief filed in the case of *Halleck v. Grey*, submitted at the October Term. Section one hundred and forty-eight, of the act relating to estates, provides that "no sale of any estate shall be valid, unless made under an order of the Probate Court." This provision simply denies the right to the administrator, or executor, to sell without the authority of the Court.

BURNETT, J.—Charles S. Saroni executed two mortgages, the first to the plaintiff, and the second to the defendants Stetson, Wilkinson, and Sawyer. The mortgagees in the second mortgage foreclosed their mortgage, sold and purchased the premises, and received a deed from the sheriff. The plaintiff then brought his suit to foreclose, making Saroni and the second mortgagees parties, and had personal service upon Saroni; but, before judgment, Saroni was lost on the Central America. The defendant Rogers, having administered upon the estate, the claim was presented to him, and rejected, and he was then made a party, by a supplemental bill. The District Court rendered a decree for the amount of the mortgage-debt, and for a sale of the mortgaged premises; and, in case the proceeds were not sufficient, then a judgment for the residue. From that part of the decree ordering a sale, the administrator appeals to this Court.

This suit is an amicable one, in which the facts are all admitted. The amount of the debt being some twenty thousand dollars, and the mortgaged property hardly of sufficient value to pay it, the parties interested are anxious to remove all doubt as to the title that may be acquired under the sale.

Before proceeding to examine the important and difficult question submitted to this Court for decision, we may state that, when the former decision was made, there were no briefs filed, or references to authority, statutory or otherwise. The late Chief Justice, in one of his opinions, spoke of such a practice as being erroneous, and as imposing upon the Court either the necessity of making a hasty decision, or the labor of looking up authorities. If parties themselves have sufficient doubt of the correctness of a decision, and sufficient interest in the matter to

induce them to bring up the case before this Court, they must file briefs and references to authorities; otherwise we will not undertake the investigation of the case, so long as all our time is demanded by the other business of the Court.

The only question for this Court to determine is, whether the facts admitted, "showing the first and second mortgage, and the sale of the equity of redemption under the second mortgage, the estate of Saroni had such an interest in the premises as to render it necessary that the Probate Court should order the sale, upon the application of the administrator, or of the plaintiff, and to oust the District Court of jurisdiction to order a sale."

The first question is, whether there is any substantial difference (so far as regards the exclusive jurisdiction of the Probate Court) between this case, and a case where the equity of redemption belongs to the estate. At common law, a mortgage vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent. But this theory is entirely changed by our system, and the legal title remains with the mortgagor, subject to be divested by a foreclosure and sale. And, when regularly sold, the purchaser obtains whatever title was in the mortgagor at the instant of time when he executed the mortgage. In the case of *Bigelow v. Bush*, (6 Paige, 345,) it was decided, by Chancellor Walworth, that where the mortgagor had, absolutely, and *without warranty*, subsequently sold his interest in the premises, he was not a necessary party, unless the mortgagee wished a decree over against him for the residue; and that the grantee of the mortgagor could not complain if the mortgagor was not made a party, for the reason that the grantee could not be injured. The property mortgaged was primarily liable for the debt, and the grantee of the mortgagor took it subject to that primary liability. If the mortgagor had sold with warranty, or had the mortgagee demanded a decree for the residue, then he would have been a necessary party.

The reason upon which this decision is based is very satisfactory. As the mortgagee asked no more than the value of the property mortgaged, and sought no personal judgment over against the mortgagor, the latter having sold his remaining interest in the property, he had no interest either in the amount of the judgment, or in the sale of the property.

But it would seem that this decision is against the position taken by the counsel of the plaintiff.

If the plaintiff in this case had looked only to the mortgaged property for his debt, then the estate could have no interest, either in the amount of the judgment or in the sale of the property; and the administrator would not have been a necessary party. But when the plaintiff asks for a decree of sale, and then a judgment over against the estate, the administrator has an in-

terest, not only in the amount of the judgment, but in the sale of the property. The amount of the residue, for which the other property of the estate would be liable, depended upon the sale made under the decree; and the administrator, therefore, was a necessary party, and was deeply interested in the mode in which the sale should be conducted.

In a case like this, the plaintiff had his election to release the estate from all further liability. Had he done so, then the property mortgaged would not have been assets in the hands of the administrator. But while he held the estate responsible for the full amount of the claim, the property must be assets. The estate, in such a case, owes the *entire* debt; and a part of the assets, out of which to pay it, is the property mortgaged. The mortgage-creditor could only do one of two things—either make the debt and property compensate and balance each other, or keep the claim as his own, and leave the premises the property of the estate, subject to his prior lien. It would seem clear that had the administrator and the Probate Judge admitted the claim, then the administrator could have sold the property under the order of the Probate Court. This he could not do unless it was the property of the estate. And when, by the decree of the District Court, the property is sold, it must be sold *as the property* of the estate. Had the plaintiff only sought to make the property liable, and not the estate, for the residue, and only filed his bill against the purchasers under the second mortgage, the death of Saroni would not have been mentioned in the complaint. And had not these subsequent purchasers desired a sale, it is not certain that any sale would have been required, but that the decree might have stood in the place of a deed. The sale would seem to be only a part of the remedy, that may be omitted in proper cases.

We can see no substantial difference between this case and a case where the estate owns the equity of redemption. The difference is only in degree, and not in principle. The sale under the second mortgage was without warranty, and only conveyed to the purchasers the right to redeem, or the right to the surplus proceeds. It left the estate deeply interested in the mortgaged premises. Suppose the estate had ample means to pay all the debts, and that the plaintiff had wished to abandon his mortgage, and present his claim as a simple debt against the estate; would the law have allowed him to do so? And if the law had allowed him to do so, would the entire title have vested in the purchasers under the second mortgage, and the estate thus have lost the value of the mortgaged premises or the amount of the debt? Under the theory that the mortgaged property was not assets, this could have been done. The subsequent sale by the mortgagor, without warranty, only conveys whatever right he has at the time; and his right to have the mortgaged property

sold, and the proceeds applied to the mortgage-debt, is no more divested in such a case than the rights of the mortgagee.

The next question to determine is, whether the District Court, having regularly acquired jurisdiction of a suit against an administrator or executor, to foreclose a mortgage, can decree a sale of the mortgaged premises.

Under the provisions of the act to regulate the settlement of the estates of deceased persons, all claims must be presented to the administrator or executor, for allowance. If rejected by him, the creditor may bring his suit in the proper Court; but the only effect of a judgment against an administrator, upon any claim for money, shall be to establish the claim in the same manner as if it had been allowed by the administrator and the Probate Judge. Upon a judgment rendered against the deceased in his lifetime, no execution can issue; but where an execution is issued before the death of the decedent, and actually levied, the property may be sold under it. (§§ 140, 141.)

It may be said, with much apparent reason, that these provisions, relating to the effect of a judgment against the administrator, are confined simply to money judgments, and not to decrees for the sale of mortgaged property. In cases of executions levied, and in cases of mortgages, there exists a lien upon specific property; and as the act allows the sale of the property upon which the lien of the execution has attached by the levy, a sale under the decree of foreclosure should be allowed for the same reason. But to this it may be answered that a judgment obtained against the deceased before his death is a lien upon his property, which is not divested by his death; and yet the statute clearly requires the sale of such property to be made under the order of the Probate Court. It is true, the lien of the judgment is general, while that of the mortgage is upon particular property.

Section one hundred and forty-eight provides "that no sale of any property of an estate shall be valid unless made under order of the Probate Court." This language is negative and restrictive, general and comprehensive, and would seem to be very clear and explicit. We will suppose that the Legislature intended to prohibit all sales of property belonging to the estates of deceased persons, unless made under the order of the Probate Court. In that case, could language more plain and distinct have been used? Under the probate law of Texas, from which our system is mainly derived, it is "not lawful for any executor, or administrator, to sell the estate of his testator or intestate, unless under the directions of the will or the order of the Chief Justice." (Hart. D., p. 374, Art. 1177.) Here the prohibition only applies to sales made by executors and administrators; while our statute has omitted this limitation and has adopted the general negative and positive provisions of section one hundred

and forty-eight. But, besides this plain language, the act itself goes on to specify one exception to this general prohibition, namely: where an execution has been levied before the death of the deceased. The act, having assumed to point out the exception to the general rule, must be presumed to have intended no other exception but the one specified. If the law-maker attempts to set out exceptions to a general rule, he must be presumed, from the very nature of the act, to intend to complete his work, and not to leave it unfinished. (*Bird v. Dennison*, April Term, 1857.)

But there is no exception in favor of sales under decrees of foreclosure. On the contrary, there is an express provision (§ 186) in reference to sales made by the executor or administrator of property "subject to any mortgage or lien," which secures the prior rights of such creditors. In addition to these considerations, we may remark that the act subjects the sales of the real estate of the deceased to the confirmation of the Probate Court, after all parties interested have had an opportunity to make their objections. The real estate can only be sold after personal estate has proved to be insufficient. It is true that, under the peculiar facts of this case, the administrator could have no motive to prevent the sale of the mortgaged premises. But it is equally true, that the estate has every interest in securing a sale for its full value, as the other property of the estate, both real and personal, will be responsible for the residue. (§§ 170, 171.)

In opposition to this view, it is urged by the learned counsel for the plaintiff that an administrator's deed only conveys to the purchaser "all the right, title, interest, and estate, of the testator, or intestate, in the premises at the time of his death;" and that, consequently, if the sale of the mortgaged premises in this case be made by the administrator, the purchaser would not obtain the title the intestate had at the time he executed the mortgage, but only that which he had at the time of his death; that is, *none at all*. (§ 172.) This is certainly the legitimate result of the theory adopted by the learned counsel. But suppose the administrator and the Probate Judge had allowed the claim of plaintiff; would it have been then necessary to go into the District Court to procure a valid sale? And if a sale had been made by the order of the Probate Court, would not the purchaser have obtained the title the mortgagor had at the date of the mortgage? The true theory would seem to be, that a sale by an administrator or executor is made for the benefit of all the creditors, and in the order of their several priorities; and that, in the contemplation of the act, the title existing in the testator or intestate at the time he executed the mortgage, or suffered the judgment, still continued in the deceased at the time of his death,

for the purposes of administration, and passes to the purchaser under the probate sale.

Taking the different provisions of the act together, and it is indeed very difficult to resist the conclusion that no sale of property belonging to the estate of a deceased person can be valid under the act, unless made by order of the Probate Court, except in the case where an execution has been levied in the lifetime of the deceased.

But conceding, for the sake of the argument, that the construction we have given the act is correct, the question arises, whether the District Court has jurisdiction of such a case under the Constitution. These Courts have "original jurisdiction, in law and equity, in all civil cases when the amount in dispute exceeds two hundred dollars, exclusive of interest."

In the case of *Wilson v. Roach*, (4 Cal. Rep., 366,) it was held by this Court, that "the District Courts of this State have the same control over the persons of minors, as well as their estates, that the Courts of Chancery in England possess; that this jurisdiction is conferred by the Constitution, and cannot be divested by any legislative enactment." And in the case of *Clark v. Perry*, (5 Cal. Rep., 60,) it was held, that "the Probate Court is a Court of special and limited jurisdiction," and that "most of the general powers belong peculiarly and originally to the Court of Chancery, which still retains all of its jurisdiction."

It is a favorite rule of equity, that when a Court of Chancery gains jurisdiction of a case for one purpose it will retain it for others, and not do justice by halves, and thus foster a multiplicity of suits. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when the District Court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief; and, for this purpose, to decree and execute a sale of the mortgaged premises. We do not mean, however, to say that, where the claim is allowed by the administrator and the Probate Judge, the mortgagee could still go into the District Court for an order of sale.

Upon a careful consideration of the case, we think the decree of the District Court should be affirmed.

FIELD, J.—I concur in the judgment of affirmance in this case, on the ground that the District Court, by the Constitution, possesses jurisdiction in all equity cases where the amount in dispute exceeds two hundred dollars, exclusive of interest, of which it cannot be divested by any legislative enactment.

CHASE v. SWAIN *et al.*, ADMINISTRATORS.

It is no ground for setting aside a judgment by default, that the defendant was ignorant of the law requiring him to answer in ten days.

To plead a former judgment in bar, it must appear not only that it was upon the same cause of action, but between the same parties.

A judgment against an administrator, though in the form of a common money-judgment by default, is valid, its only effect being to establish the validity of the claim.

A judgment by default may as well be taken against an administrator as any other party.

APPEAL from the District Court of the Seventh Judicial District, County of Contra Costa.

This action was brought against the defendants, as administrators of John Marsh, deceased, for the recovery of a judgment against said estate, for the sum of \$1,052. Personal service of the summons and complaint was had on both of defendants; and no answer or demurrer having been filed in time by either of defendants, a judgment by default was entered, that "the plaintiff recover of and from the defendants the sum of \$1,052, the amount set forth in his said complaint, with costs and disbursements."

Defendants moved to set aside the judgment on the ground that the default was taken against them through "mistake, surprise, inadvertence, and excusable neglect." And also "on the ground that it appears by the complaint that the cause of action had before the commencement of this action been fully and fairly adjudicated." The affidavit in support of this motion alleged ignorance of the law respecting the time for answering, and "that the whole of said demand has been once adjudicated in this Court, and judgment concerning the same rendered in favor of John Marsh in his lifetime." The complaint alleged that the claim was for services rendered the said John Marsh in his lifetime by one Ygnacio Sibrian. That in the month of December, 1855, the said Ygnacio Sibrian assigned by draft, as collateral security to plaintiff, \$500 of said claim. That on the 19th day of May, 1856, the said Sibrian sued, in his own name, John Marsh, for the recovery of said sum of \$1,052, as the transfer of the whole claim had not been then made to plaintiff. That said Marsh had judgment in said action on the ground that the action was not brought in the name of the party in interest in said claim. That on or about the 10th day of December, 1856, the said Sibrian assigned and transferred, by writing, the whole of said claim, in accordance with the verbal transfer before made. That on the 11th day of said month of December, the plaintiff presented said claim, so assigned, accompanied by

the affidavit of said Sibrian and plaintiff, as sole claimant thereto, to the defendant Swain, as administrator, for his approval or rejection of the same, in whole or in part. And that said Swain, as such administrator, rejected the whole claim and refused to allow any portion thereof. The Court below denied the motion to set aside and open said judgment, from which order and judgment the defendants appealed.

*John Currey* for Appellants.

The judgment entered in this action is erroneous, because the facts stated in the complaint do not constitute a cause of action.

In the first place, the complaint shows a former action in the District Court of the Seventh Judicial District, by Sibrian against said John Marsh, in his lifetime, for the same identical cause of action, and a verdict in such action rendered in favor of defendant.

This former action and the verdict rendered, the appellants contend, is a bar to any other action for the same cause.

Where a demand has been once submitted to a jury, and passed upon by them, it is a complete bar to another action for the same cause. *Manny v. Harris*, 2 John., 24; *Brockway v. Kenney*, 2 ib., 210; *Phillips v. Berrick*, 16 ib., 136; *Feeter v. Mulliner*, 2 ib., 181; *Young v. Blark*, 7 Cranch, 565; *Cutler v. Cox*, 2 Blackf., 178.

There is nothing in the complaint showing that Marsh had any notice of the alleged verbal assignment until the same became disclosed upon the trial; and the complaint in this case shows that any assignment that had at that time been made was of an interest in said demand as "collateral security."

By the respondent's own complaint, Sibrian was the legal owner of the demand on which he sued John Marsh at the time his action was commenced in May, 1856, and at the time when the verdict aforesaid was rendered. The only allegation in the complaint which affirms an assignment of any interest in the demand mentioned, is, "that near or during the month of December, A. D. 1855, the said Sibrian did, by draft, assign, as collateral security, to this plaintiff, five hundred dollars of said claim, for value received therefor."

The allegation of the assignment of five hundred dollars of said claim, as contained in the plaintiff's complaint, is meager of the fact, and viewed the most liberally, does not amount to an averment of the transfer of the legal title of any portion of said claim.

If Sibrian gave to Chase a draft on John Marsh for \$500, such instrument did not of itself make Marsh debtor to said Chase for such amount. If the draft had been presented to and dishonored by Marsh, then Sibrian might have had his action against Marsh for the demand sought to be drawn by the draft; but Chase by

such draft acquired no legal demand against Marsh, the drawee.

If any assignment did take effect, it was in the nature of a pledge of an interest in the demand to the extent of \$500, as collateral security.

Choses in action may be pledged, as a pledge in something put in pawn or deposited with another as a security for the repayment of money borrowed, or for the performance of some agreement or obligation. 2 Kent's Com., 577; Edwards on Bailments, pp. 188, 197; Wilson v. Little, 2 Comstock R., 443; Allen v. Dykers, 3 Hill R., 593.

In the case of a pledge, the pledgor returns the legal title in the thing pledged, and the right to redeem by discharging the original debt or obligation. Garlick v. Janes, 12 John., 147; Edwards on Bail., 201; 2 Kent's Comm., 581, 582; Stearns v. Marsh, 4 Denio, 227.

In the second place, the complaint does not state facts sufficient to constitute a cause of action against the defendants, because it does not appear upon the face thereof that the claim on which this action was brought was presented to the administrators as required by law.

Chapter six of the act to regulate the settlement of the estate of deceased persons, specifies the duties of administrators, and also of creditors, in respect to claims against such estates.

Section one hundred and thirty-one of said act provides as follows:

"Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same, to the knowledge of the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers to be produced in support of the claim." Comp. Laws., p. 395.

Unless the claim presented to the administrators be supported by the proof specified in said section, the administrators have no power to allow it. The administrators can act only in cases where the creditor moves them to act by a compliance with the statutory requirements; without the statutory proof they have no power or jurisdiction to allow the claim.

The averment in the complaint, if regarded as true, fails to show a compliance with the requirements of the statute, for the reason that it does not appear that the affidavits established either—

1. That such claim was justly due; or,
2. That no payment has been made thereon; or,
3. That there were no offsets to the same to the knowledge of the claimant.

For aught that appears, the administrators may have rejected

the claim, for the reason that it was not properly avouched or verified, and before they, as the representatives of said estate, can be charged with an omission to perform a duty enjoined by law, it must appear affirmatively that a case was established by the claimant in respect to such claim, as demanded and required its allowance.

Again, the Court will observe that, by the last clause of said section one hundred and thirty-one, "the executor or administrator may also require satisfactory vouchers to be produced in support of the claim."

This last clause evidently means vouchers in addition to the affidavit of the claimant. Now, I contend that before the administrators can be regarded as in default of their duty in respect to this claim, and the judgment is predicated upon the hypothesis of such a default, the complaint must show that the administrator did not require satisfactory vouchers to be produced in support of the claim.

The reasoning of this Court in the case of *Ellisen v. Halleck et al.*, at the October Term, 1856, is fully applicable to the case at bar.

The one hundred and thirty-sixth section of said act provides that "No holder of any claim against an estate shall maintain an action thereon unless the claim shall have been first presented to the executor or administrator."

There cannot be any doubt that the claim must be presented, sustained by the proper evidence of its justness, and also evidence that no payments have been made on it, and that there are no offsets existing against it, to the knowledge of the claimant. *Ellisen v. Halleck*, above cited.

The judgment entered is a general judgment against defendants, without qualification; and also entered upon default without any proof to sustain the validity or justness of the demand; on both these grounds the appellants assign error.

Section one hundred and forty of the act to regulate the settlement of estates of deceased persons, provides that the judgment shall only have the effect to establish the claim in the same manner as if it had been allowed by the executor or administrator, and the Probate Judge.

*H. Allen* for Respondent.

The default was properly and regularly taken before the clerk of the District Court. *Prac. Act.*, § 150.

In support of the motion to vacate the judgment in the Court below, the defendant Swain states, in his affidavits: "That the default of the defendants has been taken against them by the inadvertence of this deponent."

In support, the deponent wishes to bring the case within the

scope of the sixty-eighth section of the Practice Act by using the word "inadvertence."

Instead of a statement of facts, in which the Court may determine the questions of inadvertence, as a conclusion of law he adopts the word as his own.

Then what is the sense of the word as it is used in Swain's affidavit? Certainly, nothing more than its ordinary sense, inattention or neglect.

So, in the affidavit of the defendant, James Marsh, the deponent states a conclusion of law when he states in his affidavit, "that the judgment entered in this action was taken against the defendant greatly to the surprise of deponent, and entirely through the excusable neglect of defendants."

The defendants were in no way taken by surprise, for the summons was personally served upon both of them; and the summons gave them notice to answer in ten days or judgment would be taken for the amount claimed.

Swain states in his affidavit "that deponent was not aware that it was necessary to make the answer to said complaint or appear thereto, before the first day of the present March Term of this Court."

This only shows ignorance of the law, and is no ground for relief under the sixty-eighth section of the Practice Act.

In the case of *Wallace & Ryland v. Mary Bennett*, decided at the January Term of this Court, 1855, the defendants, in the affidavits in support of the motion to abate the judgment, stated "that the summons was served while she was lying ill; that as soon as she could she consulted a lawyer, who advised her that it was not necessary to file an answer; as she was a married woman, she could not be sued without her husband; that she was unable to read, and that she has a good defence as the plaintiffs did not perform the service for her they agreed to do when she signed the note."

But the Court says, "There is no error or record which the Court can notice. The judgment was properly taken before the Clerk, and we cannot consider the affidavits on which the subsequent motion was made to vacate the judgment. If the defence has any rights, she must assert them in some other way."

In the case at bar, the affidavits in support of the motion to vacate the judgment, do not state the facts as favorably in support of the motion, as were stated in the affidavit of Mary Bennett, in the case above cited. The case does not come within the scope of the sixty-eighth section of the Practice Act. Such was the opinion of the District Court.

But this appeal was taken from the judgment of the Court below as well as from the order of refusal to vacate the judgment.

Appellants object to the sufficiency of the complaint to support the judgment. One point relied on is a former verdict upon the same subject-matter, in a suit by one Ygnacio Sibrian against John Marsh. The counsel upon this point seems to assume that the former suit was between the same parties.

The authorities he cites on this point are cases in which the former suit was always between the same parties and upon the same subject-matter.

A judgment in a suit for the recovery of money, is no bar to a subsequent suit, unless it be upon the same points, and between the same parties. *Phillip, adm'r, v. Thompson*, 3 Stew. & Potter, 369.

The proposition that Ygnacio Sibrian having no interest in the claim which is the subject-matter of this action, could assume to have an interest and bring suit against John Marsh, and get defeated, and thus bar the right of the real owner to recover his claim, is absurd, and requires no controversy.

The claim was assigned to Chase, by parol, if not in writing, before Sibrian brought suit against John Marsh. Sibrian had no right of action. A debt or claim may be assigned by parol as well as by writing. Any transaction which indicates the intention of the contracting parties to pass the beneficial interest in the claim, is sufficient for that purpose. 2 Story's Eq., 311; *Heath v. Hale*, 4 Taunton, 326.

The appellants' counsel also takes the ground that the plaintiff's claim, when presented by him to the administrators, was not accompanied by the proper affidavit, as required by statute. *Comp. Laws*, p. 395, § 131.

In answer to this, it may be affirmed that nothing appears in this complaint to show that plaintiff's claim was not accompanied by the proper affidavit.

And it appears that the claim was formally and, in writing, rejected by both administrators before suit was brought against them by plaintiff to recover the claim.

By section one hundred and thirty-two of the statute, when a claim, accompanied by the affidavit required in the preceding section, is presented to the administrator, he shall endorse thereon his allowance or rejection.

It is presumed that the administrator acted according to law, and that the proper affidavit accompanied the claim when presented, from the fact that they acted upon it. 1 Greenleaf on Ev., § 40.

"The neglect of a party to appear and answer to process, legally commenced, in a Court of competent jurisdiction, he having been duly served therewith and summoned, is taken conclusively against him, as a confession of the matter charged." 1 Greenleaf on Ev., § 18.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action against the defendants, as administrators of John Marsh, deceased. Personal service was duly made on both defendants; and, no answer having been filed within the time prescribed by law, a judgment by default was taken.

Defendants moved to set aside the judgment, on the ground that the default was taken by the mistake, inadvertence, or excusable neglect of defendants; and also on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The affidavits in support of the motion not only fail to show any reason for setting aside the judgment on the first ground, but disclose the most gross and culpable neglect on the part of defendants. They were personally served, and took no steps in the matter, even by consulting an attorney, until the time for answering had expired; the only excuse offered for this neglect is ignorance of the law requiring an answer to be filed within ten days.

The objection to the sufficiency of the complaint is not tenable. The complaint shows that Marsh, in his lifetime, was indebted to one Sibrian, who assigned a portion of his claim to plaintiff, as collateral security; that afterwards he made a parol assignment of the whole claim to plaintiff, for a valuable consideration; that, after such assignment, Sibrian brought suit on the demand against Marsh; that it appeared in evidence on the trial that the present plaintiff was the real owner of the claim, and that a general verdict was rendered in that suit for the defendant.

It is now claimed by appellants, that the verdict in that suit is a bar to this action. We are not able to see how the action of Sibrian, after he had parted with his interest in the claim, could prejudice the rights of his assignee, who does not appear to have had any notice of the proceeding. In order to constitute a bar to the action, it should appear that the former suit was not only about the same cause of action, but between the same parties. As the present plaintiff was a stranger to the former suit, his rights are not affected by its result.

We think that the allegation that the claim was presented to the administrators, accompanied, "as vouchers for the truth thereof," by the affidavit both of plaintiff and his assignor, and was formally rejected, sufficient to enable the party to maintain the action without stating the contents of the affidavits.

The objection to the form of the judgment is not well taken; it is entered in the usual forms of judgments by default; and, though upon its face a general money-judgment, yet the one hundred and fortieth section of the Probate Act declares that the effect of such a judgment shall be only to establish the valid-

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McKeon v. Bisbee.

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ity of the claim. We see no reason why a judgment by default may not be taken against an administrator, as well as any other party. The law requires that he should be served with process, but provides no means of compelling him to answer. The default must be taken as an admission of all the material allegations of the complaint, which are, we think, sufficient to entitle plaintiff to recover.

The allegations as to the merits of the defence, contained in the affidavits of defendants, were entitled to no consideration at the hands of the Court. If defendants had shown any reasonable or valid excuse for their failure to answer, then it would have been proper for the Court below to consider the nature of the facts relied on as a defence, in order to determine whether the ends of justice would be promoted by opening the judgment.

None of the causes for setting aside a judgment by default, mentioned in the statute, are shown to exist in this case, and the Court below properly refused the application.

Judgment affirmed.

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### McKEON v. BISBEE.

The interest of a miner in his mining-claim is property, and may be taken and sold under execution.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

A statement of the facts appears in the opinion of the Court.

*Hall & Hume* for Appellants.

The only point in this case is upon the question whether mining-claims can be seized and sold under execution?

Appellant holds the affirmative, and says, first, that mining-claims are property; second, that such claims, when the property of an individual, may be sold to satisfy any judgment against him; because, third, mining-claims are not exempt by law from execution.

A mining-claim is a piece of land, supposed to contain in its soil or rock, gold, or other precious metal. Its boundaries are usually marked by stakes, notices, ditches, or other evidence of the claim, and the possession of the claimant is actual *possessio pedis*. As is the case with all mines, the land is chiefly valuable on account of the mineral contained within it. The land must

be marked out and taken possession of, before it can be called a "mining-claim."

A mining-claim, then, being land, is property. It is a thing which is in itself a "subject of right," and being land, is necessarily real property. The fact that the land contains mines, does not change the character of the land itself.

It may be true, that the land belongs to the general government, or to this state; but no such fact appears in the record of this case, and no such point is made by respondents in the record.

Possession of land has often been decided to be evidence of title in fee. *Suñol v. Hepburn*, 1 Cal., 254; *Castro v. Gill*, 5 Cal., 40; *Potter v. Knowles*, ib., 87; *Norris v. Russel*, ib., 249; *Grover v. Hawley*, ib., 485; *Doe v. Herbert*, Breese, 280; *Doe v. West*, 1 Blackf., 134; *Hutchinson v. Perley*, 4 Cal., 33; *Hicks v. Dans*, ib., 69.

If, then, an individual is found in possession of a piece of land, claiming it as his own, it is his property, to all intents and purposes, and may be treated as such. His rights therein can only be affected by a paramount title. It can make no difference, so far as the title to the land is concerned, for what purpose the possessor intends to use it, whether for agricultural, building, or mining purposes. The title to the mineral contained in the soil is another question.

By the English law, which we have in part adopted, mines of silver and gold within the realm are the exclusive property of the crown, and this right is entirely distinct from, and independent of, any right or ownership in the soil. The Supreme Court of this state, in *Hicks v. Bell*, 3 Cal., 219, have decided that a like right to and property in mines of the precious metals within this State, is vested in the State of California. Apart from this prerogative claim, the property in all minerals is *prima facie* in the owner of the fee. *Collier on Mines*, 14; *C. Littleton*, b. 4; 2 Black. Com., 18; 10 East., 273.

Taking this to be the law, then the party in possession of the claim is the owner of the land, and the same may be seized for his debts; but as he is not the owner of the gold contained in the claim, the gold cannot be sold for his debts. But the result is practically the same, for if the purchaser gets a title to and possession of the land, the party dispossessed would have no right to return upon land which no longer belonged to him, to take therefrom gold which never belonged to him.

But appellant contends that the State of California, by a long course of consistent legislation upon this subject, has abandoned her claim to the precious metals, which she might have had by virtue of her sovereignty; that she has not merely neglected to assert her claim, but that her legislation amounts to a complete abandonment or renunciation thereof.

Any government or sovereign power may renounce or abandon

any claim of power or authority, when a further exercise of such authority or power shall be deemed inexpedient or detrimental to the interests of the people; and this may be by express terms, by implication, or by long non-user. In England, at one time, the crown laid claim to all minerals, and in recent times, attempts were made to comprise within the prerogative all mines of tin and copper, until, in the reign of William and Mary, all mines of tin, copper, iron, lead, etc., were secured to the subject by act of Parliament. Collier on Mines, p. 13, and authorities there cited. We need not cite particular instances of similar results, but point to the absolute power exercised by the Plantagenets and Stuarts, as compared with the very limited authority exercised by Victoria.

The Legislature of this State have, almost from the organization of the State government, passed laws upon the subject of mining and mining-claims. All these laws have treated mining-claims as the property of individuals, with a full knowledge that said claims are being worked, and the gold extracted therefrom, for individual use. The State has passed laws protecting the individual in the possession of his claim, and in the right to take gold therefrom; and has so far favored the miner, as to give him, in the mining region, rights to go upon the enclosure of another, to dig gold—a privilege which has been accorded to no other class of citizens.

We cite some of the laws which have been passed upon this subject:

April 19, 1850, an act for the better regulation of the mines and the government of foreign miners.

May 4, 1852, an act to provide for the protection of foreigners, and to define their liabilities and privileges.

In both these acts, the right of the American citizen to work the mines is conceded, and the right is granted to the foreigner on payment of license.

January 22, 1853, an act explanatory of the duties of sheriffs, or Statutes of 1853, page 19, provides for the sale of mining-claims for taxes.

May 15, 1854, an act to provide revenue for the support of the government of this state. By this act, mining-claims are expressly exempted from taxation.

April 7, 1857, an act to amend the act for the protection of foreigners.

April 29, 1857, an act to provide revenue for the support of the government of this state, expressly exempts mining-claims from taxation.

April 29, 1851, an act to regulate proceedings in civil cases in the Courts of Justice of this State. Section 571 of said act provides, that in actions to recover possession of a mining-claim, the pleadings shall be verified. Section 621, same act, provides,

that in actions respecting mining-claims, proof shall be admitted of customs, usage, etc. These provisions of law still remain on the statute-book the same as when passed.

May 13, 1854, an act to amend the act last before-cited, provides, in sections 63 and 64, for the appointment of a receiver by the justice of the peace, in actions respecting mining-claims; and on the 28th April, 1855, the last-mentioned act was amended, as it stands at present upon the statute. Articles 1374 and 1375, Wood's Digest, page 248.

Other statutes, bearing upon the subject, might be cited, but the above are deemed sufficient.

The Courts of this State have, in innumerable instances, adjudicated the conflicting claims of individuals to mining ground, and have, in all cases, treated such claims as individual property. The Supreme Court of this State have, it seems to me, sustained the views taken by us.

In *McClintock v. Beyden*, 5 Cal., 97, the Court says: "The government of this State being a government of the people, has, so far as its action has been determined, modified the claim to the precious metals," etc. And again, "The act of April 13, 1850, passed for the better regulation of the mines, and the government of foreign miners, seems to give, by necessary implication, whatever right the State might have in the mineral in the soil, and the right to mine, to all native-born or naturalized citizens of the United States who may wish to toil in the gold placers." Again, "The act of 1851, regulating proceedings in civil cases, (621,) would seem to extend to him (the miner) whatever right she (the State) might have to the mineral when found."

In *Stiles v. Laird*, 5 Cal., 120, the Court decides that miners have a species of property in mining grounds, etc.

In *Fitzgerald v. Urton*, 5 Cal., 308, the Court says, "That the Legislature of our State has seen proper to foster and protect the mining interest as paramount to all others." In *Irwin v. Phillips*, 5 Cal., 140; *Tartar v. Spring Creek Co.*, ib., 397; and in *Stokes v. Barrett*, ib., 36, the right of the miner in mineral land, is discussed and affirmed.

In *Schnepler v. Evans*, 4 Cal., 213, this Court decides, that in an action brought by one partner to recover possession of a mining claim, and to recover the sum of \$2,027, his share of the gold taken out of the claim, the District Court has jurisdiction, and that legally the plaintiff had a right to the relief demanded. We cannot conceive how a plaintiff could be entitled to recover a sum of money, for gold taken out of a claim, unless the gold was the property of the plaintiff before as well as after it was taken out. If a plaintiff in a suit at law can maintain a suit for the gold taken out of a claim of which he is in possession, then the gold in the claim must be his, and he is, to all intents and

purposes, the owner of the gold as well as of the land, by virtue of his possession.

In *Sims v. Smith*, January Term, 1857, the Court affirms the right of a party in possession of a mining-claim to recover damages for an injury to the same. In *Freeman v. Powers*, the Court decides that a mining-claim may have certain value, when it determines that justices of the peace have no jurisdiction in those cases where the claim is worth more than two hundred dollars.

In *Merced Mining Co. v. Fremont et al.*, April Term, 1857, those questions are discussed at length, and the Court says, "If these views be correct, the owner of a mining-claim has, in practical effect, a good vested title to the property, and should be so treated, until his title is divested by the higher right of the superior proprietor."

Other decisions have been given, all of which recognize the rights of the miner to the undisturbed use and possession of his claim.

We then hold, that a mining-claim in the possession of an individual, and claimed by him, is his property, to all intents and purposes.

If, then, it is the property of an individual, it may be seized and sold upon execution against him for his debts.

Section 123 of the Practice Act, says, that the writ of attachment shall direct the sheriff to seize all the property of the defendant not exempt from execution, or enough to satisfy plaintiff's demand.

Section 217, Practice Act, says, "All goods, chattels, moneys, and other property, real and personal, of the judgment-debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, shall be liable to execution."

Section 219, Practice Act, defines what property is exempt from execution. Mining-claims are not exempted, and, therefore, if property of the judgment-debtor, are liable to be sold under execution.

If mining-claims cannot be sold under execution, then the miner may be the owner, and claim to be the owner, and be protected in his property in the same, as against all the world, (except only the right of the State, which may never be asserted,) and at the same time, to his creditor, deny his own title. This, we think, would be an absurdity.

*Sanderson & Newell* for Respondent.  
No brief on file.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action to recover possession of a mining-claim, the plaintiff alleging title and prior possession. The defendant set up a title by purchase at a sale under execution. A demurrer to the answer, on the ground that the facts stated constituted no defence, was sustained by the Court below, and a judgment rendered in favor of plaintiff.

The question presented is, whether a mining-claim is liable to seizure and sale under execution.

By our statute, "all goods, chattels, money, and other property, real and personal, of the judgment-debtor, not exempt by law," is liable to execution.

Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is "the right and interest which a man has in lands and chattels, to the exclusion of others;" and the term is sufficiently comprehensive to include every species of estate, real or personal. (17 Johns., 283; 14 East., 370.)

The Legislature have, by a series of enactments, recognized the right of the miner to take and occupy, for mining purposes, a portion of the public domain, and have provided a remedy by action against all who trespass on his possession.

"By this appropriation he acquires a vested interest in the exclusive occupation and enjoyment of the land, as against all the world, subject only to the right of the government by whose license and permission his possession was acquired; and his right to protect the property, for the time being, is as full and perfect as if he was the tenant of the superior proprietor for years, or for life." (*Merced Mining Company v. Fremont*, April Term, 1857.)

He has, in addition to the right of exclusive possession and enjoyment, the right of absolute disposition; and may sell, transfer, or hypothecate, without let or hindrance from any one. Contracts for the sale of such interests have been frequently recognized and enforced by the Courts.

We think the interest of a miner in his mining-claim is property, and not having been exempted by law, may be taken in execution.

Judgment reversed, and cause remanded for further proceedings.

### WILLIAMS v. WALTON.

Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the County Court: *Held*, that it was void *in toto*, that Court having no jurisdiction over the subject-matter of the award. The Court having no jurisdiction, the arbitrators could have none; nor could they have common law powers, when appointed in the mode provided by statute.

APPEAL from the Superior Court of the City of San Francisco.

A statement of facts necessary to understand the points decided, appears in the opinion of the Court.

*Gregory Yale* for Appellant.

The articles of submission between the parties, dated on the eleventh of July, 1856, require that the submission be entered as an order of the County Court of San Francisco County. The conclusion of the submission is this: "It is further stipulated, in this submission, that [the] submission be entered as an order of the County Court, of said County of San Francisco, and that the same be filed with the clerk of said Court."

This provision was based upon § 381 of the Practice Act, ch. 4, of title 10.

The section provides that, "it may be stipulated, in the submission, that it be entered as an order of the County Court, or of the District Court," etc.

The submission to arbitration, under this section, is a mode of instituting a suit, by consent of both parties, who select their Court mutually, and substitute a party for the Judge. The parties subject themselves to the Court. The clerk, by this section, enters the case in his registry of actions, makes a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, and the time limited by the submission, if any, within which the award is to be so made, and, when so entered, the submission cannot be revoked, without the consent of both parties. The arbitrators are then under the power of the Court. They "may be compelled by the Court to make an award, and the award may be enforced in the same manner as a judgment." The parties, as well as the arbitrators, are then in the power of the Court.

The same principle prevailed in England, and a party could enforce an award by attachment, though he had obtained judgment in an action on the bond, or on the award, for he may think an attachment a more expeditious and effectual process than suing out execution on the judgment. Kyd on Awards, 315.

But this must be in a Court of competent jurisdiction. The County Court has no jurisdiction over the subject of awards. Awards do not belong to the class of special cases contemplated by the Constitution, which the Legislature may confer upon County Courts. These special cases, this Court says, in *Parsons v. Tuolumne Water Company*, 5 Cal., 43: "must be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of Courts of Common Law and Equity. The action to prevent or abate nuisances is not one of these, and is simply provided for in the Courts of general jurisdiction. In conferring this power upon the County Courts, the Legislature ex-

ceeded its constitutional authority, and the portion of the act which contains it is invalid."

The same principle was extended by this Court to the exclusion of jurisdiction over cases of mechanics' liens. *Brock et al. v. Bruce et al.*, 5 Cal., 279. The Court says: "The mechanic is entitled to receive compensation for his labor and materials, and may enforce his rights by suit, in Courts of general jurisdiction."

The principle in these two cases was again affirmed by this Court, in *Minnichite v. Ramirez*, July T., 1857.

The whole subject of arbitration is an old one, well known to the common law, and belongs to Courts of general jurisdiction. The very section conferring jurisdiction on the County Courts, also confers it on District Courts, where it properly belongs.

The submission was, therefore, a nullity. The proceeding was void, from its incipency. Both parties acted under the belief that the County Court had the jurisdiction. It was a part of their contract. The mutual mistake discharged both parties from all liability under the submission. The acts of the arbitrators, under the submission, were void. The award was not binding, on either party.

*Waller & Osborn* for Respondent.

The parties to the submission appeared, both in person and with counsel, before the arbitrators, presented their claims, and were satisfied with the proceedings, until two weeks after the award was found and published, when the plaintiff gives notice that he will not be bound by it, files his mechanic's lien, and commences this action.

First, we say the plaintiff, notwithstanding the naked stipulation referred to, might enforce this award by suit in the District Court, had he chosen to do so, and this is his only remedy.

Admitting, as true, that a statute arbitration, under the three hundred and eighty-first section of our Practice Act, is a mode of instituting a suit, and of giving the prevailing party a summary method of enforcing an award, still, there is no suit until some action is had in the premises, by the Court designated, and the prevailing party may therefore choose another remedy, which will be as effectual.

Admitting that the County Court has no jurisdiction of the amount embraced in the award, and that this section (three hundred and eighty-one) of the Practice Act does not designate any of the special cases of which the County Court has jurisdiction, so that this award may not be regarded as a good statutory arbitration, under the provisions of the Practice Act, it is yet a perfectly good common law arbitration.

This Court has held that our statute in relation to arbitrations is only affirmatory of the common law on this subject, and in-

tended to furnish a short and speedy means for judicial enforcement of an award. See *Richie v. Peachy*, 4 Cal., 205.

This arbitration is, then, good, as a common law arbitration, for even if that part of the submission quoted above, and objected to, is bad, the rest of the submission, and the award under it, is good, for an award good in part and bad in part may be enforced for that which is good, when that part which is void is not so connected with the rest as to affect the justice of the case. See *Martin v. Williams*, 13 John., 264; *Cox v. Jagger & Belknap*, 2 Cow., 638.

And where, in an award partly bad, a separation can be made between that which is good and that which is bad, it should be made, if possible. *Buthe v. Mayor of New York*, 1 Hill, 490.

Here the award is good, in every respect, if a good award can be made; yet, plaintiff undertakes to disregard it wholly, and set it aside, on the sole ground that the stipulation referred to, without which the submission is perfectly good, is void.

In a case much like this, where the submission contained a stipulation that neither party should appeal, this Court held that the award might be good, though this stipulation was void, for the reason that parties cannot deprive the Courts of jurisdiction. See *Muldron v. Norris*, 2 Cal., 74; *Cromwell v. Marsh*, 1 Bruse, 270.

It is also well settled by this Court, that an award can only be set aside for fraud, mistake, or accident, and that it must be done by bill. See case above quoted. *Richie v. Peachy*, 4 Cal., 205; *Muldron v. Norris*, 2 Cal., 74.

This award was made, and duly published, a considerable time before he gave notice that he would not be bound by it, and this Court held, in *Jarvis v. The Fountain Water Company*, that an award rendered on a fair arbitration of the matter in dispute, and long considered, is conclusive of the rights of the parties. 5 Cal., 179.

An award is a bar to an action for the matters embraced therein. 11 John., 189; *Caldwell on Arbitrations*, 417.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action for work and labor, and for materials furnished. The defendant set up, in bar, a former submission of the same matters involved in this suit to arbitration, and the award of the arbitrators. In the submission, it was stipulated that the same should be entered as an order of the County Court. The defendant had judgment in the Court below, and the plaintiff appealed.

The only question in the case is, whether the award was void.

It is clear that the County Court had no jurisdiction, and could

render no judgment. 5 Cal., 43, 279; *Minnichite v. Ramirez*, July T., 1857.

The submission in this case was made under the provisions of the three hundred and eighty-first section of the code. The submission, under the statute, is but one mode of instituting a suit; and, after the submission is filed with the clerk, and the proper entry is made by him, the submission becomes irrevocable, without the consent of both parties; and the arbitrators may be compelled by the Court, to make an award; and, when made, it may be enforced by the Court, in the same manner as a judgment.

It is well settled that an award may be good in part, and bad in part, or void *pro tanto* or *in toto*; and may, therefore, be enforced, or not, accordingly. (2 Cal., 79; 1 Hill, 495; 2 Cowen, 638; 13 John, 364.) But if the parts be inseparable, the whole must stand or fall together.

It is insisted, by the counsel for the defendant, that although the County Court had no jurisdiction of the subject-matter, and no judgment could be rendered upon the award, it is still good as a common law arbitration, and can be enforced by suit in the District Court.

But we think this position is not correct. The objection goes to the whole award; and when parties expressly stipulate to submit their matters in controversy in a special statutory mode, we have no right to infer that they intended to be bound at all, unless the mode stated was substantially pursued. A common law submission is a very different thing from a submission under our statute. In the latter case the proceeding is in Court, the arbitrators are under its control, and the remedies of the parties much more simple, direct, and efficient. We cannot undertake to decide that the parties in this case would ever have agreed to a common law submission. They evidently intended a proceeding in Court, where each party could avail himself of all the remedies allowed by the statute. As they both intended the proceedings to be under the control of the Court, and as they were both equally mistaken as to its want of jurisdiction, the submission was wholly void. The arbitrators under this statutory submission constitute a part of the Court; and if the Court itself has no jurisdiction, the arbitrators can have none; nor can they have common law powers, when appointed in the mode provided for by the statute.

For these reasons, the judgment of the Court below is reversed, a new trial ordered, and the cause remanded, for further proceedings.

## IN THE MATTER OF ARCHY, ON HABEAS CORPUS.

The right of transit through each State, with every species of property known to the Constitution of the United States, and recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity.

The character of immigrant or traveler, bringing with him a slave into this State, must last so long as it is necessary, by the ordinary modes of travel, to accomplish a transit through the State. Nothing but accident or imperative necessity could excuse a greater delay. Something more than mere ease or convenience must intervene to save a forfeiture of property which he cannot hold as a citizen of the State through which he is passing.

But visitors for health or pleasure, stand in a position different from travelers on business, and are protected by the law of comity.

It is the right of the judiciary, in the absence of legislation, to determine how far the policy and position of this State will justify the giving a temporary effect, within the limits of this State, to the laws and institutions of a sister State. To allow mere visitors to this State for pleasure or health, to bring with them, as personal attendants, their own domestics, is not any violation of the end contemplated by the Constitution of this State.

The visible acts of a party must be taken as the only test of his intentions, in deciding whether he is entitled to be considered a mere visitor; of which fact his declarations constitute no evidence.

The privileges extended to visitors cannot be extended to those who come for both business and pleasure. A mere visitor is one who comes only for pleasure or health, and who engages in no business while here, and remains only for a reasonable time. If the party engage in any business, or employ his slave in any business except as a personal attendant upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom.

This rule admits of no exception upon the ground of necessity or misfortune, or it would introduce uncertainty and complexity, and lead the Courts into profitless investigations. The pecuniary condition of the party is difficult of proof and will not be inquired into; nor will the rule be relaxed to meet the hardships of a particular case.—*Burnett, J.*

Where the facts show that the delay of the visitor was unavoidable, the fact of his engaging in labor, in order to support himself during his necessary detention, does not divest his rights under the law of comity.—*Terry, C. J.*

## HABEAS CORPUS.

Charles A. Stovall, a citizen of the State of Mississippi, petitioned this Court for a writ of *habeas corpus*, for the recovery of his slave, Archy. The writ was issued, and on the return thereof, the following argument of counsel, and decision of the Court was made.

The facts appear in the opinion of the Court.

*James H. Hardy*, of counsel for Petitioner, Stovall.

There is no question, from the return of the writ and evidence in the case, that the boy Archy was a slave owned and held to service by the petitioner, in the State of Mississippi. Nor is there any pretence of any voluntary or actual emancipation of the slave by his master.

Counsel for the slave, however, have urged that he was

voluntarily brought to this state by his master, and that he is thereby manumitted.

In reply, I contend that there is no proof in the case that Archy was brought voluntarily into this State by his master. The whole evidence shows that he owed service in Mississippi—that about the first of January last, he was in this State with his master, and that when about leaving the State he escaped from him.

In support of petitioner's right to remove the slave I contend:

1. That the eighteenth section of the first article of the Constitution of this State is inoperative, and requires legislative aid in the shape of penalties, and manner of procedure, to give it effect.

2. That for the purpose of transit or sojourning in or through the State, he has fully and completely the guaranty of the Constitution of the United States.

3. That even if the eighteenth section of the first article of the Constitution be operative upon our citizens, it has no effect as against travelers or sojourners, by reason of the constitutional provisions both of this State and of the United States; and,

4. That no emancipation of the slave can be had or presumed without due process of law.

1. The eighteenth section of the Constitution of this State reads: "Neither slavery nor involuntary servitude except for the punishment of crimes shall ever be tolerated in this State." My argument is that this section is addressed to the Legislature, and is a prohibition to the passage of any law tolerating slavery; perhaps it is a command to the Legislature that a law be passed with proper penalties to prohibit the institution of slavery. But there is no magic in those few words which would destroy the rights of property, nor can I conceive of a thing so absurd as a Court attaching penalties to a law which the law itself does not contain. Every law must possess the remedial virtue as well as the declaratory, or it is worthless. Blackstone's Commentaries, vol. 1, pp. 56-7.

So here, if the framers of the Constitution intended this section to operate as law, they have failed to so support it with penal sanction as to give it that effect. It was lost labor to say, "slavery shall not be tolerated," unless they cause to be added to the clause, "emancipation," or other penalty, "shall be the consequence of a violation of this declaration."

The utter helplessness and imbecility of the section, standing alone, show conclusively that the framers of the Constitution looked to the Legislature to carry out the anti-slavery provision. And this view is further strengthened by the fact that Constitutions are not intended to operate directly. The philosophy of a Constitution is to prescribe rules and fix restrictions upon the

different branches of government, and the means of enforcing constitutional provisions are almost universally left for the Legislature to prescribe.

Mr. Clay, in a very learned argument, in a case involving the effect of a constitutional prohibition, used this apt and illustrative language :

"The nature of Constitutions is to establish and declare principles, and except in some particular cases to leave to the Legislature the enactment of laws to carry out the principles thus declared." 15 Pet. U. S. R., 483.

Mr. Webster, in the same case, expressed the same view, more at length. In speaking of the effect of the prohibition, he says :

"It is clear, that if it was intended to be, in itself, a law which would carry into effect the principle declared by it, it would have gone further—it would have made provisions which would secure its execution."

Again, he says :

"As it stands in the Constitution, it is entirely powerless and nugatory. The importation of slaves was prohibited. How prohibited? How prevented? Forfeited if brought in the State? Emancipated? No such provision. Neither of these results would follow, and the constitutional declaration, without penalties and further provision, was a dead letter—a nullity." 15 Pet. 491-2.

Slavery is to be prohibited in this State. How is it to be prohibited? What will become of the slave when brought into the State? Will he be executed? Or emancipated? Will you consecrate the slave to freedom, or confiscate the lands of the owner? The Constitution and the Legislature have left us in the dark as to the penalty.

This view of the case is supported by the decision of the Supreme Court of the United States, in the case of *Groves v. Slaughter*, 15 Pet., 496 to 503.

This last case is cited and approved by the Supreme Court of this State, in the case of *Perkins on habeas corpus*. 2 California Rep., 455.

Indeed, so entirely reasonable and consistent with principle is this view of the force of the eighteenth section, that I can scarcely conceive of the effect of a contrary doctrine.

Counsel for the slave have contended that this provision is intended to secure personal liberty, and therefore must be construed as operative without legislative sanction.

If the truth of the hypothesis were admitted, the conclusion could not follow which counsel have formed. But I cannot consent to stultify the members of the convention who framed, or my fellow-citizens who ratified the Constitution, by the indulgence of the thought that the section in view owed its place in

the Constitution to so blind an infatuation as sympathy for a few hundred negro slaves.

I had always supposed that the anti-slavery clause of our Constitution was a measure of State policy.

I regard this section like every other police regulation, as having been engrafted in the Constitution because the members of the convention deemed it for the public good; and, as every other police ordinance, it requires the sanction of penalties to give it validity.

Even in this State, slavery is only *mala prohibita*, and surely a man may do what is not morally wrong until the act is prohibited and made penal. Blackstone's Com., vol. 1, 58.

This view of the section is further strengthened by a recurrence to the history of the times in which it had its origin.

At the time of the formation of the Constitution of this State, there were a large number of slaves in the State who were owned and held to service here. By the Constitution and laws of the United States, slavery was then tolerated here, and might be continued so long as the State remained a territory. *Dred Scott v. Sanford*, 19 Howard R.

I am further confirmed in my view by a thought of the anomalous idea of a Court prescribing penalties for the violation of a Constitution. One Judge would prescribe emancipation of the slave; another, less opposed to slavery, would find a milder punishment, and so on through a catalogue of variations; each Judge must descend from his high dignity of expounding what the law is, to the forum of the politician and maker of law.

But counsel argue, that slavery is so unnatural, and is so essentially the creature of positive law, that in the absence of municipal regulation, every man must be free.

If this theory be true, we have the sanction of positive law for slavery even in California. As has been before argued, slavery exists by virtue of the Constitution and laws of the United States in all the territories of the Union, and in all of the States where it has not been excluded by positive law enacted by their law-making power. So that, in California, slavery having been planted here by the operation of the Constitution of the United States, it must continue to exist here until the Legislature, by the enactment of sufficient prohibitions and penalties, has asserted the paramount sovereignty of the State. *Dred Scott case*, 19 Howard's U. S. Reports.

The counsel, who claims for slavery an origin in municipal regulation, argues but little for his knowledge of history, and less for his knowledge of law.

Blackstone himself says, that slavery had its origin, *jus gentium*, and was based on the right of the captor, in case of war, to the life or services of the captive. 1 Black. Com., 424.

If this be true, it proves that slavery is not the creature of

legislation, for the laws of nations is at best but a moral rule of action, having its origin in the laws of nature. 1 Kent's Commentaries, p. 2.

Slavery derives its force and dignity from the same principles of right and reason, the same views of the nature and constitution of man, and the same sanction of Divine revelation as those from which the science of morality is deduced. Its effect, is the moral and physical improvement of the slave himself.

Blackstone, with all of his abhorrence of slavery, does not pretend to controvert the fact, that slavery was of immemorial custom and usage, nor did he pretend to ascribe it to municipal regulation; and when it is conceded by this author that slavery is and has been, from time immemorial, a custom and usage, he has established for us an institution of the common law, which, he says, has not its existence by virtue of enactment, but because it has been the practice of mankind, from a time beyond which the mind of man runneth not to the contrary.

The most learned jurist of England since the days of Lord Hale, one who, upon the subject of international law, stands second to none on earth, has said of slavery, "It never was in Antigua the creature of law, but of that custom which operates with the force of law." *Slave Grace*, 2 Haggard's Reports, 126, *et seq.*

What positive law gave the parent the right to the custody of his child? What municipal regulation gave the guardian the right to the services of his ward? That general usage resulting from necessity, which is the origin of almost every human institution. It is to the same usage and necessity that the relation of master and slave is attributable, and neither of the former relations have claim to greater antiquity than the latter, nor are they more consonant with sound morality and religion.

It has been said by an English author, that "personal slavery, arising out of forcible captivity, is coeval with the earliest periods of the history of mankind. It is found existing, and as far as appears, without animadversion, in the earliest and most authentic records of the human race. It is recognized by the codes of the most polished races of antiquity. Under the light of Christianity itself, the possession of persons so acquired has been, in every civilized country, invested with the character of property, and secured as such by all the protections of law." *Wildman's International Law*, p. 10.

The same author refers to a decision rendered by Justice McLean in the U. S. Circuit Court, in which that Justice, true to his instincts, says, "Slavery, being unjust, inhuman, and unnecessary, is a violation of the law of nature, and, therefore, contrary to the law of nations." The author says, "this opinion is elaborately incorrect, and founded upon erroneous principles." *Ibid.*, 99.

2. That the petitioner has the guaranty and sanction of the Constitution of the United States of the privileges of transit and sojourn through or in any of the States, and that his personal property may be carried with him, without any danger of loss or confiscation by the peculiar ordinances of the State through which he may pass, or in which he may be situated as a sojourner.

The government of the United States is one made up of many. The North and the South are blended together for the common defence, "to form a more perfect union," to "establish justice," "insure domestic tranquility," "and to promote the general welfare," and to secure the blessings of liberty to ourselves and our posterity.

At the time of the adoption of the Constitution, nearly all of the States were slave States, and the citizens of each were deeply interested in slave property. Is it possible that the framers of the Constitution ever dreamt, in the formation of a more perfect union, that they were confining the citizens of each State to the enjoyment of his rights in that State alone?

If these States had remained separate, there is no question that the citizens of each might, by the laws which govern separate nations, have traveled through or sojourned in any of the States, and that his property, though with him in that State, would have remained his, and his rights over it would have been enforced.

Did the formation of a "more perfect union" between States destroy rights which would have been secured by the laws of nations to each of the States? Is "justice" established by the confiscation of a citizen's property because his interest or his pleasure has induced him to visit a sister State? Is "domestic tranquility insured" by an instrument which secures to the citizen of one State the full, free, and perfect enjoyment of his peculiar property, but denies the same rights to citizens of other States with their peculiar property?

Is "domestic tranquility insured" by saying to the citizens of one of the States, "if a citizen of another State travel this way with his property, you may set upon him and plunder him of his estate, and your State (by some local regulation) may protect you in an act that would have been a felony had it been done to a subject of a foreign nation?"

Does the Constitution of the United States provide for the "general welfare" if it be true that California may, by her local legislation, do acts to the citizens of Mississippi, which, if done by a foreign nation, would be just cause of war?

The second section of the fourth article of the Constitution provides, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Is this provision consistent with a State regulation which would

deny the immunities of a citizen in this State to a citizen of the State of Mississippi?

But the most palpable and unmistakable evidence that the framers of the Constitution intended to give this kind of property the protection of the federal government, is found in the latter part of the same section: "No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor." But counsel argue that this clause relates to fugitive slaves. Does it? Archy is a fugitive slave! He has escaped from his master; he is in this State. Is he made free by any regulation in this State? The section referred to says not.

If the petitioner had come into this State for a domicile, his position would be different—he and his property must depend upon and be judged by the laws of his home. But as a citizen of Mississippi, traveling through or sojourning in this State, he is protected by the Constitution of the United States, and that instrument secures him everywhere in the rights he had in his own State, and, so long as he retains the *animo revertendi*, that Constitution guaranties that his rights shall be judged in all the States by the laws of his domicile.

3. If the eighteenth article of our Constitution be operative, and took effect *eo instanti* upon the admission of California into the Union, it could only take effect in this State, and upon citizens of this State.

Persons traveling through this State were never under the operation of that Constitution. The laws of a foreign State do not operate upon an alien traveler or sojourner. He is bound by none of the laws of the State through which he may pass, except, perhaps, her criminal law. He must not commit any crimes—but with respect to his property it is deemed and taken to be a part of his own State's total wealth, and is not subject to any regulation of the State through which he passes.

Kent says: "Every nation is bound in time of peace to grant a passage, for lawful purposes, over their lands, rivers, and seas, to the people of other States, whenever it can be permitted without inconvenience, and burdensome conditions ought not to be annexed to the transit of persons and property." 1 Kent Commentaries, 34.

*Lydia v. Rankin*, 2 A. K. Marshall Kentucky Reports; *Strader v. Graham*, 7 B. Monroe.

In Illinois, the rule has been fully considered and approved, and the mistress of a slave, temporarily sojourning in Illinois with her property, was held to have lost none of her rights over her property; and when the slave escaped, the person who harbored her was held responsible for his crime to the laws of Illinois. *The People v. Willard*, 4 Scammon.

In the case of *The Louis*, Sir William Scott used this language: "It is pressed as a difficulty what is to be done if a French ship, laden with slaves, is brought in? I answer, without hesitation, restore the possession which has been unlawfully divested, rescind the illegal act done by your own subject, and leave the foreigner to the justice of his own country." Cited in the case of *The Antelope*, 10 Wheaton, 119.

This doctrine has been fully affirmed by the Supreme Court of the United States, in the case of *The Antelope*, 10 Wheaton, 120. And Chief Justice Marshall, in rendering the opinion, declares that, "though the slave trade is prohibited by the laws of the United States, and though the slaving-vessel and her commander be brought into the United States for adjudication, the vessel and slaves must be restored to the owner." And he says that "the law of the domicil of the slaver not having prohibited the slave trade, the Courts of the United States have no power, notwithstanding the prohibition by our law, to punish the party engaged in it, either personally or by deprivation of property."

And why not? Because, being a citizen of another nation, his wrongful acts must be addressed to his own nation for adjudication and punishment.

Is the analogy not striking? The petitioner owned this slave in his own State; he was his own property, and by accident, necessity, or choice, has been temporarily found in this State.

If it be true that the laws of this State prohibit slavery, remember that he asserts his claim not by virtue of California's laws, but those of Mississippi. Shall his slave be emancipated by a California Court? No, rather refer the question of his freedom or slavery to the petitioner's own Courts—to the slave's own Courts—and with their decision not only we, but the people, and, over all—the law—will be satisfied. Deny him that, and you deny him justice.

Another principle which lies at the foundation of the master's claim is the principle *lex loci*. Every agreement or obligation is to be carried out in each State according to the law of the State where the agreement is to be executed, or where the obligation is due.

The obligation of this slave is to serve his master in Mississippi; that obligation was created in and must be carried out by the laws of Mississippi.

Mr. Justice Story says: "As to acts done and rights acquired in other countries, the law of the country where the acts are done or the rights are acquired will generally govern in respect to the capacity, state, and condition of the person. And, therefore, in regard to questions concerning infancy, competency to marry, incapacities incident to coverture, guardianship, and other personal relations and rights, the law of the domicil is not

generally to govern, but the *lex loci contractus aut actus*." Story's Conflict of Laws, ch. 4, pp. 96-8.

If, as I think none will deny, the relation of master and servant is a civil and personal relation, there can be no further question that the laws of Mississippi and not of this State are to govern the Court in its decision. And it must not be forgotten that the relations of master and servant are like those of guardian and ward, parent and child, or any other relation involving mutual interests, duties, and responsibilities.

4. No emancipation or other deprivation of one's property can be made or presumed without due process of law.

The eighth section of the first article of the Constitution of this State secures the owner in the protection of his property on as sacred grounds as the eighteenth section does the police of the State, and when the framers of the Constitution directed the Legislature to pass a law to prohibit slavery as a matter of State policy, they had already, as an act of palpable justice, secured private property from the haste of legislation.

Mr. Chancellor Kent says, of due process of law: "It means law in its regular course of administration through Courts of Justice." 1 Kent Com., 613; 2 ib., 14.

Justice Bronson, in the case of *Taylor v. Porter*, says: "The words 'due process of law' in the Constitution cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property." *Taylor v. Porter*, 4 Hill, 147.

Chief Justice Ruffin says that these words "mean that statutes which would deprive a person of the right of property without a regular trial according to the course and usage of the common law, would not be due process of law in the sense of the Constitution." *Hoke v. Henderson*, 4 Devereux N. C. R., 15.

Now, if the petitioner has lost his property in the slave, it must arise from one of two causes:

*First*—He must have been guilty of some offence against the laws of this State, the penalty of which is to forfeit his property, or,

*Second*—By some act of his own, or by operation of law, the slave must have become the property of some other person, or have become free.

If his title had been divested by the first means, he has not yet been tried or convicted according to the "course and usage of the common law." Nor has he been convicted of any offence according to any of the modes "prescribed for ascertaining guilt."

If the negro is free, let it be asserted in a Court competent to try the matter, and such a Court can only be found in the State of Mississippi.

As to the power of the Court to award the slave to the peti-

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tioner, it is only necessary to refer to the *Habeas Corpus Act*, Wood's Digest, p. 477, §§ 26 and 34.

*Winans*, of counsel for Archy.

Conceding that Stovall left Mississippi with the intention of returning in eighteen months, that would have allowed him a year's residence or sojourn in this State. If he designed to be a sojourner here for that time, and to carry on business, and let out his slave during that time for hire, he would be acting in violation of the spirit and meaning of the constitutional prohibition of slavery. But after his arrival here he appears to have entertained nothing but a remote undeveloped intention of leaving the State at some future unascertained period—if we judge from his statements; but if we judge from his acts, he appears to have invested himself with all the rights, attributes, and characteristics of continuing citizenship. He made his advertisement for scholars, and announced his school as permanent, not as transient. The business is one which for its success looks to permanency. He also hired out Archy from time to time, and told the parties hiring him that they could keep him as long as they chose, saying nothing about intending to leave the State.

This question is not to be settled in his favor by simply proving that he retained the *animus revertendi*. If that alone was the criterion, he might preserve the *animus* for years, continuing here and enjoying all the rights, immunities, and advantages of citizenship the while. The true criterion is this, (if the doctrine of comity be sustained,) was he simply engaged in an actual passage or transit through the State, and were the circumstances which detained him of such an unavoidable character that they still preserved him in a condition of actual transit? The case of *Julia v. McKinney*, 3 Missouri, 270, is a leading authority on this subject.

The same doctrine is declared and affirmed in *Wilson v. Melvin*, 4 Missouri, 597.

Now, if these cases be authority, they establish the fact that where the doctrine of comity is recognized and enforced, it only applies to travelers through a State, and does not extend its operation to sojourners therein at all. A sojourner is a "temporary resident." (Webster's Dictionary.)

The points established by these cases in Missouri are two: first, that the principle of comity, where it is recognized, can only be applied to a traveler, not a sojourner, and that even in the case of a traveler he must travel through the State with all reasonable expedition, incurring no delays but such as are unavoidable; and secondly, that for a master to hire a slave to labor for only one or two days and receive the compensation therefor in a free State, entitles the slave to his freedom.

If Stovall was not accidentally overtaken, while here, by a

stress of unforeseen circumstances which compelled him to do as he did, and contrary to his original intention, then certainly he violated the provision of our Constitution in reference to servitude, and the slave is entitled to his freedom.

The claimant entered our State with a full knowledge of its institutions; he commenced the pursuit of business and the acquisition of fortune here in obedience to our laws. He thereby obtained and enjoyed all the advantages of citizenship. Should he not be subject to all the disabilities thereof? Should he not yield to the restraints which are enjoined on those who own the ties of citizenship? Would it be just to give him all the rights, emoluments, and safeguards of a citizen of California, and yet, because he cherished a purpose to return to another State, of different institutions, throw around him the broad mantle of its privileges, conflicting and discordant though they be? If, on the one hand, a true national feeling shall induce us to preserve faithfully all the equipoises of the Federal Constitution, on the other a decent respect for our institutions should demand that we maintain them for ever sacred and inviolate. Have we delegated such power as is here claimed to the federal government? Assuredly not, for the claimant has in vain invoked the aid of federal authorities. Have we conceded it unto our sister States from the powers reserved to us by virtue of our sovereignty? Certainly not, for there is no provision in our Constitution, no law upon our statute-book, that justifies this claimant in his application. See opinion of Judge Burnett, in *Nougues v. Johnson*, 7 Cal. R.

Thus far we have considered the case from the assumption that a proper regard for international law or the principle of comity among the several States, should preserve the rights of masters over their slaves while in a condition of actual transit or journey through free States. But,

2. The weight of authority is against the application of the principle of comity to any cases which affect the liberty of slaves brought voluntarily within the limits of free States. Case of *Somerset*, 20 Howell's State Trials, 79; Story on Conflict of Laws, §§ 96 and 244; Edition of 1846, pp. 371-2.

In *Forbes v. Crane*, 2 Barn. & Cress., 471, Best, C. J., says: "The plaintiff, therefore, must recover here upon what is called the *comitas inter communitates*; but this is a maxim that cannot prevail in any case where it violates the law of our country, the law of nature, or the law of God." And for the full exposition of the English doctrine on this subject, see same case, p. 448, et seq.; *Ohio Insurance Co. v. Edmondson*, 5 Louisiana, 295, 299, 300.

"Contracts which are in evasion or fraud of the rights of a country, or the rights or duties of its subjects; contracts against good morals, or against religion, or against public rights; and

contracts opposed to the national policy, or national institutions, are deemed nullities in every country affected by such considerations; although they may be valid by the laws of the place where they are made." Story on Conflict of Law, 244; and see opinion per Chief Justice Taney, in *Bank of Augusta v. Earle*, 13 Peters, 516, 589.

"It is needless to enumerate the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples, and Courts of Justice have always expounded and executed them according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations, is no impeachment of their sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests."

In the case of *Willard v. The People*, 4 Scammon, 461, it is held by Judge Douglas that comity, so far as that State is concerned, its local position between two slave States being considered, will sustain the right of transit with slaves through that State. This is the only adjudication of the question in favor of comity in such cases, to be found in any of the reports, and is entirely swept away by the force of conflicting authority in other States.

The doctrine of comity in regard to transit, even, is expressly denied in *The People v. Lemmon*, 5 Sandford, 711, 812, where it is shown that such denial existed not only in England, but also in France, and originated with the civil law. See opinion of Judge Paine. On the seventh of December, 1857, the Supreme Court of the State of New York, in full bench, rendered an opinion in the case of the slave *Lemmon*, in which they expressly deny the right of transit with slaves. Upon the question of comity, the Court held the following language:

"Comity does not require any State to extend any greater privileges to the citizens of another State, than it grants to its own. As this State does not allow its own citizens to bring a slave here, even *in transitu*, and to hold him a slave for any portion of time, it cannot be expected to allow citizens of another State to do so."

This doctrine is further and fully sustained in the case of *Nancy Jackson v. Bullock*, 12 Connecticut, 53. See opinion of the Court in that case, which is most emphatic on this point. The same principle is also affirmed in the case of *Collins v. America*, 9 B. Monroe, 569, which is the most recent decision in the Supreme Court of Kentucky on this subject.

The same denial of the right of comity, where it clashes with

the laws of a State, or its institutions, or interferes with the rights of its citizens, is declared in *Holmes v. Remson*, 20 Johnson, 263. See, also, *Prigg v. Commonwealth of Pennsylvania*, 16 Peters, 611, in which case it is denied that by the general law of nations the state of slavery is recognized in the free States. It admits that it may be recognized as a matter of comity; but considers that comity as arising from the laws of the State, and not from the decisions of its Courts in the absence of any law upon the subject.

In the case of the *Commonwealth v. Aves*, 18 Pickering, 217, it is declared "that the law arising from the comity of nations cannot apply, because if it did, it would follow as a necessary consequence, that all those persons who by force of local laws, and within all foreign places where slavery is permitted, have acquired slaves as property, might bring their slaves here, and exercise over them the rights and power which an owner of property might exercise, and for any length of time short of acquiring a domicile." And see, further, *Commonwealth v. Aves*, 18 Pick., 193, et seq., where the slave was declared free, although only brought by its master as a waiter on a temporary visit of the master to a relation.

Again, the Constitution of the United States declares that no person held to labor and service in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation thereof be discharged from such service or labor. Hence the implication is strong, indeed (as it emanates from a constitutional provision) conclusive, that such persons as do not escape, but whose owners voluntarily bring them, may be discharged by the laws or regulations of the State into which they are thus brought. For if this were not so, to what use would be the prohibition. Besides, according to the doctrine of *Marbury v. Madison*, 1 Cranch, which has been so often recognized and acted upon by this Court, the assertion of an affirmative proposition implies the negative of all other objects than those affirmed, and it cannot be presumed that any clause of the Constitution is intended to be without effect. See *Hunter v. Fletcher*, 1 Leigh Rep., 172; *Harvey v. Decker*, Walker's (Mississippi) Rep., 36, in which the doctrine is also declared that slavery exists, and can only exist, through municipal regulations. *Maria Louise v. Marcot*, 8 Louisiana, 475: "The operation of foreign laws upon slavery is immediate and perfect;" "it operates to produce immediate emancipation."

But this Court has heretofore passed upon this question, in the matter of *Perkins*, 2 California, 441, and it is there held that while the slave, by being taken upon free soil, does not become *ipso facto* free, yet that the master's control over him ceases, and he becomes therefore virtually free.

Now, if this Court recognize the doctrine of *stare decisis*, for

this is not a mere *dictum*, then the application of the claimant must be denied. See, also, *Lansford v. Coquillon*, 24 Martin's Rep., 403, and *Ex parte Simmons*, 4 Washington C. C. Rep., 396. And see *Butler v. Hoffer*, 1 Washington C. C. Rep., 499. And again, in *Commonwealth v. Aves*, 18 Pick., 218, where the doctrine of Lord Stowell is favorably cited, the Court says:

"The principle above stated, in which a slave brought there becomes free, is that he becomes entitled to the protection of our laws, and there is no law to warrant his arrest and forcible removal."

This is the very doctrine of Judge Murray, declared in the matter of *Carter*, 2 Cal., 441.

Now, in determining how far, under our seemingly absolute and uncompromising constitutional prohibition of slavery, the principles of comity should (within the constitutional restraints) be allowed, the Legislature passed the act of April 15, 1852, entitled "an act respecting fugitives from labor, and slaves brought to this State prior to her admission into the Union," in which they provided for the reclamation of fugitives escaping into the State, and also for the immediate transportation from the State of slaves brought here before the adoption of the Constitution. These constitute the entire concessions and provisions of the act, and in section five, it is provided that even in the case of a slave brought here before the Constitution, if his master seeks to reclaim him he shall not, after such reclamation, hold him in servitude in the State, except for the purposes of his immediate removal. This act was to continue in force for only twelve months, and was renewed for another twelve months by the act of 1853, after and since which time even these privileges were and have been denied to the citizens of this and other States. By this act the Legislature established three conclusions of their sovereign will:

1. That they recognized the constitutional prohibition of involuntary servitude.
2. That they did not consider such prohibition as preventing them from allowing, by comity, the reclamation of slaves brought here before the adoption of the Constitution—and were willing, therefore, to carry the doctrine of comity so far, and, of course, by necessary implication, no further; and
3. That even this concession was but temporary, and designed to be withdrawn after a brief period by the express provisions of the act.

In upholding the institutions of other governments, we cannot carry the doctrine of courtesy so far as to subvert our own. And whatever violates the spirit of our laws, the policy of our government, and the rights of our citizens, certainly has a tendency to subvert our institutions. The *Dred Scott* case, of which so much has been said, does not conflict with the principles here

contended for. It only declares that slaves being property, the master has a right to hold them in servitude in any portion of the federal territory, but it does not attempt to conclude or pass upon the rights of the sovereign States in this behalf; and if it had so done, it would have laid the cherished doctrine of State sovereignty—a doctrine no less dear to all the sister States than slavery can be to those who own it as their institution—completely prostrate in the dust.

BURNETT, J.—The petitioner, Charles A. Stovall, states, substantially, that he is a citizen of the State of Mississippi; that he is the owner of Archy, a slave, and as such entitled to his custody; that said slave has escaped from the petitioner, and is now in the charge of one James Lansing, who detains him in the city-prison of Sacramento; that Lansing has no legal authority to detain said slave; and that petitioner desires immediately to remove said slave from this State to the State of Mississippi. The petitioner then prays that said slave may be returned to his custody.

The material facts of the case, as shown upon the hearing, were substantially these:

The petitioner had been in delicate health for some five years, and, in the spring of 1857, determined to make the trip to California, across the Plains, and to bring Archy, who was a family negro servant, nineteen years of age, with him. The petitioner stated that he was going to California for his health; that that was the grand object of the trip; that he did not intend to remain in this State but a short time, not more than eighteen months, and then to return home by water. The petitioner left his wagon and team in Carson Valley, because his oxen were not in a condition to cross the mountains. He also purchased a rancho in that valley. He and Archy arrived in this city about the second day of October last. After arriving in this city he hired out Archy for upwards of a month. Most of the wages earned by Archy were paid to him, but a portion was paid by the hirer to Stovall, after Archy became sick. While Archy was sick, about eighteen days, he was well taken care of by the petitioner. The petitioner opened and taught a private school for something over two months, in this city. During this time he often stated that it was his intention to return. There was proof going to show that the petitioner was short of means upon his arrival in this State. After the petitioner and Archy had been here upwards of two months, the petitioner placed Archy upon one of the river steamers, with the intention and for the purpose of sending him to San Francisco, and from thence to Mississippi, in charge of an agent. The boy having escaped from the boat, the petitioner made affidavit before a justice of the peace, who issued his warrant commanding the officer to arrest Archy and

deliver him to the petitioner. Under this warrant Archy was arrested by a policeman of this city, who delivered him to Lansing, chief of police, who detains him in the city-prison, and refuses to deliver him to the petitioner.

This case has excited much interest and feeling, and gives rise to many questions of great delicacy. It is not so much the rights of the parties immediately concerned in this particular case, as the bearing of the decision upon our future relations with our sister States, that gives to the subject its greatest importance. The responsibilities thus thrown upon the Court we must discharge to the best of our ability. In discharging this grave duty, we can say, in the language of a distinguished jurist, Mr. Justice Mills, (2 A. K. Marsh., 815,) that "we disclaim the influence of the general principles of liberty, which we all admire, and conceive it should be decided by the law as it is, and not as it ought to be."

It is only our province to construe and apply the existing law. Whether that law be just or unjust, is a question for the law-maker, not for the Courts. It is not necessary therefore to inquire whether slavery is or is not contrary to the law of nature. Our individual opinions upon this question are of no importance in this case. The institution exists by positive law, and that positive law is paramount, and must be enforced.

It must be concluded that, where slavery exists, the right of property of the master in the slave must follow as a necessary incident. This right of property is recognized by the Constitution of the United States. (*Dred Scott v. Sandford*, 19 Howard, 451.)

The right of property having been recognized by the supreme law of the land, certain logical results must follow this recognition. If property, it must, from the nature of the case, be entitled, so far as the action of the federal government is concerned, to the same protection as other property. If permitted to exist by the general law, then it must be protected by the general law, so far as that general law would protect any other property. No distinction can be made by this law between the different descriptions of private property.

If, then, in virtue of the paramount sovereignty of the United States, the citizens of each State have the right to pass through the other States, with *any* property whatever, are they not equally entitled to this right of transit with their slaves? Is not this right of free passage a right that necessarily flows from the relation that the States sustain to each other, under the general bond of the Union? We are *one* government, for certain specified purposes; and is not this right of transit across the territory of a sister State one of the necessary incidents of the purposes and ends for which the federal government was created?

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That this right of transit with slaves through a free State exists, there would seem to be no reasonable doubt. But, as to whether it exists by constitutional right, or by the law of comity, there may exist different opinions. Mr. Justice Mills, in the leading case in Kentucky, of *Lydia v. Rankin*, (2 A. K. Marsh, 820,) sustains the right, under the law of nations. In the case of *Willard v. The People*, (4 Scam. Rep., 461,) the Supreme Court of Illinois decided that a citizen of Louisiana had the right to pass through that State with a slave. Mr. Justice Skates placed his decision both upon the law of comity and the Constitution of the United States; while Chief Justice Wilson and Mr. Justice Lockwood based their decision upon the law of comity. The Supreme Court of Missouri placed this right upon constitutional grounds, (*Julia v. McKinney*, 3 Mo. Rep., 272.) And I am not aware that this right has ever been denied to exist by the Supreme Court of any State, except by that of New York, in the case of *The People v. Lemmon*, (5 Sand., 711, 712.) In the case of *The Commonwealth v. Aves*, (18 Pick., 224,) the Supreme Court of Massachusetts notice the question, but express no opinion in reference to it. "Our geographical position," say the Court, "exempts us from the probable necessity of considering such a case, and we give no opinion respecting it."

If we place this right of transit upon the ground of comity, then it rests exclusively in the discretion of each State. (Story's *Con. of Laws*, § 244; *Bank of Augusta v. Earl*, 13 Peters, 519, 589; *Jackson v. Bullock*, 12 Conn. Rep., 53; *Collins v. America*, 9 B. Mon., 569, 571; *Forbes v. Cochrane*, 2 Barn. & Cres., 471.) Slavery being regarded by the law of nations as a mere municipal regulation, founded upon and limited by the local law, no other nation is bound to recognize the state of slavery, as to foreign slaves, within its own territorial dominions, when it is opposed to its own policy. (*Prigg v. The Commonwealth*, 16 Peters, 540.) The rule that slavery, when judged by the law of nations, is a mere local institution, and one upon which that general law does not operate, would seem to be clear. From this principle it follows, that the right of transit with property, through the territory of a friendly State, secured by the law of nations, to the citizens or subjects of other States, applies only to such property as merchandise, or inanimate things, and not to slaves. The law of nations only protects such things as are generally recognized as property by civilized nations. Property, only recognized as such by the local law, from the nature of the case, cannot claim the protection of this general law. (*The People v. Lemmon*, 5 Sandford, 681; *The Commonwealth v. Aves*, 18 Pick., 217.)

Our conclusion is, that the right of transit through each State, with every species of property known to the Constitution of the United States, and recognized by that paramount law, is secured

by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity.

It remains, then, to inquire whether the petitioner was a mere traveler through this State. Traveling is a passing from place to place—the act of performing a journey; and a traveler is a person who travels.

In the case of *Julia v. McKinney*, (3 Mo. Rep., 273,) Judge McGirk uses this clear and intelligible language: "How long the character of immigrant or traveler through the State may last, cannot, by any general rule, be determined; but it seems that reason does require it should last so long as might be necessary, according to the common modes of traveling, to accomplish a transit through the State. If any accident should happen to the immigrant, which, in ordinary cases, would make it reasonable and prudent for him to suspend his journey for a short time, we think he might do so without incurring a forfeiture, if he resumed his journey as soon as he safely could. Something more than mere convenience or ease of the immigrant ought to intervene to save him from a forfeiture. Something of the nature of necessity should exist before he would or ought to be exempt from the forfeiture. If swollen streams of water, which could not be crossed without danger, should intervene; serious sickness of the family; broken wagons, and the like, should exist, there would be good cause of delay so long as they exist, if the journey is resumed as soon as these impediments are removed, provided all due diligence is used to remove them."

In the subsequent case of *Wilson v. Melvin*, (4 Mo. R., 592,) it was held that the true test, as to whether the master violated the Constitution of Illinois in passing through that State, was whether he made any unnecessary delay in passing with his slave; and not whether the slave acquired any residence; and not whether the master became a domiciliated resident of Illinois. In the case of *Ralph v. Duncan*, (3 Mo. R., 195,) it was held that the master who permits his slave to go to Illinois to hire himself out, commits as great an offence against the Ordinance of 1787 as he who takes his slave along with him to reside there. This decision is affirmed in the case in 4 Mo. R., 598. And in the latter case, the Court said: "And still less will it avail him, that the slave is not under his *coercion* while staying in Illinois. Under his own inspection, the slave would probably conduct himself with propriety; suffered to ramble, and undertake work where he pleased, his opportunities to do mischief would be much greater."

These rules were laid down by the Supreme Court of Missouri at a time when there was little or no excitement upon the subject, and when a more fraternal feeling existed among the citizens of different States, than has been lately manifested by many persons of extreme views in all portions of the Union. They

are, for that reason, the more entitled to our calm respect. They would seem to be founded upon a due consideration of the rights, both of the free and slave States. They are, in our view, eminently just and sensible in themselves, and susceptible of plain and practical application. The right of transit with slaves through a free State is secured to the owner; but this right must be exercised with a strict regard to the laws of the State through which the transit is made. The traveler must pursue his journey with no *unnecessary delay*; and to excuse any delay he may make, something of *necessity* must exist, such as "swollen streams, serious sickness in the family, broken wagons, and the like." The cases mentioned are all of such a character that no foresight or precaution could prevent them; nor could such foresight do away with their *effects* when they should occur, and those are all facts susceptible of easy proof.

The question then arises whether the conduct of the petitioner as a traveler comes within the principles laid down. The theory of the petitioner is, that he was compelled to leave his wagon and team in Carson Valley, and remain here until the succeeding spring; that he was short of means, and that he and Archy were obliged to resort to business to defray expenses in the meantime, so as to be able to return home when he could dispose of his property.

Conceding, for the sake of the argument, all that is claimed by the petitioner, the excuse alleged does not, in our view, come within the rule. It was not such a case of necessity as to justify the interruption of the journey. The inability of his team to cross the mountains could not, perhaps, have been prevented; but the effect of this want could have been obviated by proper caution. True, he might have been subjected to some pecuniary loss by at once pursuing his journey; but this is a mere inconvenience, and not such a circumstance as will excuse the delay. In the case from 3 Mo. R., 274, the same ground was urged; but it was held insufficient. The Court then said: "In this case, we see nothing in the nature of accident to prevent the owner from taking the plaintiff to Missouri immediately. The excuse set up is, that the owner was a widow, and might not have had the means of immediate transportation of the slave to Missouri; that she was a new-comer in the country, and might be poor, and, therefore, unable to do it; that some reasonable time ought to be allowed to her to provide a residence for herself and family, and that one month, in this case, is not too much. We are of opinion, that the excuse, to raise an exception, must be something more than the mere convenience or inconvenience of the owner." And in the same case it was held, that when a person did not intend to introduce slavery into the State of Illinois, but did in fact do so, the slave was entitled to her freedom.

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But there is another important aspect in which this case may be viewed, and that is, to regard the petitioner as a mere visitor for health or pleasure. And it is conceived that this question is very different from the other, and depends upon the law of comity, and not upon constitutional right.

In the case of *Strader v. Graham*, (10 How. R., 93,) the Supreme Court of the United States held this language:

"Every State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the States in this respect are restrained or duties and obligations imposed upon them by the Constitution of the United States."

And in the case of the *City of New York v. Miln*, (11 Peters, 138,) it was held, "that all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive."

In the case of *Strader v. Graham*, the owner of certain slaves, who were musicians, permitted them to go from the State of Kentucky to Cincinnati, in the State of Ohio, for a temporary business purpose. The slaves were there employed as musical performers, for hire, and then returned home, and afterwards sued for their freedom. The Supreme Court of Kentucky held that they did not become free. (5 B. Monroe, 183; 8 B. Monroe, 635.) Upon writ of error to the Supreme Court of the United States, that Court held it had no jurisdiction of the case, as no law of the Union was involved in its determination.

The question, whether a citizen of a sister State shall be permitted to remain a reasonable time simply as a visitor with his slaves, and under what conditions, is a question purely of local jurisdiction, and must depend upon the peculiar policy and situation of each State. It is insisted by the learned counsel for Archy that the question of comity is one for the Legislature to determine, and not for the Courts. This is certainly a very important power, and one that partakes of a mixed character. It is both legislative and judicial. It would seem almost impracticable for the Legislature to provide for all the instances where the law of comity must be applied. And until the Legislature does make provision, the Courts are under the necessity of determining how far the rule of comity must apply. Such has been the practice of the Courts, as stated by Judge Story, in his *Con. of Laws*, page 25. So, also, Chief Justice Parker, in the case of *Blanchard v. Russel*, (13 Mass. Rep., 6,) says: "As the laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction; for if they

should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected."

The same principle was asserted by Mr. Justice Lockwood, in his able opinion in the case of *Willard v. The People*, (4 Scam., 474.) After stating the principle, the learned Justice asks: "Is the case presented in the record of such a character as to appeal to the sound discretion of this Court to enforce the laws and institutions of a sister State? In answering this question, regard should be had to the geographical position of Illinois, as well as to the relations we sustain to our sister States, confederated under the same general government."

We conceive it to be the right of the judiciary, especially in the absence of any legislation upon the subject, to determine how far the situation of this State, its policy, and condition, would justify us in giving effect, for a temporary period, to the laws and institutions of other States within our own territorial limits. This question, we conceive, should be decided with a sincere desire to extend to our fellow-citizens of other States, all the hospitalities consistent with our own just rights.

The geographical position of California, with respect to the other States of the Union, is peculiar. Such is our situation, that a citizen of a slave State will scarcely, if ever, wish to pass through this State with his slave, as a mere traveler, either for business or pleasure. But our position, climate, and productions, all naturally invite our fellow-citizens as visitors. When they come to visit us, for health or pleasure, shall they be permitted to bring their domestic servants with them, to attend upon them or their families as waiters? The citizens of the free States can bring their confidential servants with them—why should not the citizens of the slave States be allowed the same privilege? It is true, the domestics in the one case are hired servants, while in the other they are slaves. But should this induce us to exclude the one and admit the other? Persons who live in the slave States, and have long been accustomed to their own domestics, who constitute, in fact, a part of the family, very naturally desire, in making visits, to take these domestics with them, especially when they come as invalids seeking for health. It is our policy and duty not to clog the privilege of visiting us, with unnecessary restrictions. We look forward to the day when California will be frequented by visitors from all parts of the Union. We have every reason to expect it.

But this privilege should be confined strictly to mere visitors, and not extended to those who come for both business and pleasure. And the character of visitor should be determined solely by the acts of the person, and not by his declarations. In a case like this, we conceive the declarations of a party, or his intentions, constitute no test and no evidence. The Supreme Court of Missouri was right, when deciding that, though a par-

ty did not intend to introduce slavery into Illinois, but did in fact do so, he incurred a forfeiture of his slave. The fact of intention is often difficult to ascertain; it is the secret and invisible determination of the mind; and, unless shown by outward acts, cannot be known. On the contrary, the visible acts of a party are susceptible of easy proof, and the inquiry becomes simple and certain.

As acts must constitute the true test, whether the party be a mere visitor or not, those acts should be clearly defined, that the party may know the exact extent of the privilege granted. In our view, a mere visitor is one who comes only for pleasure or health, and who engages in no business while here, and remains only for a reasonable time. If the party engages in any business himself, or employ his slave in any business, except as a mere personal attendant upon himself, or family, then the character of visitor is lost, and his slave is entitled to freedom; and we cannot admit of any exception to this rule, upon the ground of necessity or misfortune. Were we to do so, it would introduce uncertainty and complexity, and lead our Courts into profitless investigations. We cannot ascertain, with any certainty, the pecuniary condition of the party. It is a matter difficult to show. He may have ample means, and yet have the appearance of present poverty. This is a question we will not inquire into; we prefer a plain, practical, and efficient rule; one that all can understand and follow. It is true that unforeseen losses may sometimes occur to visitors; but there are so many ways in which their effects may be obviated, without engaging in business, that we cannot relax the rule to meet the hardships of a particular case. Prudence and foresight will guard against these pecuniary losses, in most cases; and, if not in all, it must be regarded as the misfortune of the visitor.

In the case of *Julia v. McKinney*, already referred to, it was decided by the Supreme Court of Missouri, that the hiring out of the slave for one or two days, in the State of Illinois, incurred a forfeiture, under the second section of the sixth article of the Constitution of that State. That section provided "that no person bound to labor in any other State, shall be hired to labor in this State, except within the tract reserved for the salt works," etc.

There is no such provision in our Constitution; but the question arises whether such a prohibition does not necessarily result from the general principle. This section in the Constitution of Illinois was necessary, to mark the exception to the general rule excluding slavery from the State. Had no exception been intended, then it is conceived that such a provision would have been unnecessary. But if a citizen of another State should be permitted to hire out his slave, or use his labor in the prosecution of any business, even for a temporary period, and with

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the intent to return again to his own State, it would, in our opinion, be a violation of the Constitution of this State. It was the very purpose of the Constitution to prohibit such a state of things. It would be allowing a privilege to the citizens of other States, in the prosecution of their business in this State, which our Constitution denies to our own citizens. This is a privilege that the Constitution of the United States does not secure to the citizens of other States. The provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," secures to a citizen from home, in a sister State, the privileges enjoyed by the citizens of the State where he is a sojourner, and no more. If put upon an equality with our own citizens, in the prosecution of his business in this State, there can be no just ground for complaint. The sojourner has no right to enter with slave-labor into business competition with those who are not allowed the same privilege. Even in the case of a fugitive slave, the owner has only the right, under the Constitution of the United States, to remove him from the free State in which he may be found, and not the right to employ him in labor, even for a temporary period and purpose.

But to allow mere visitors to this State, for pleasure or health, to bring with them, as personal attendants, their own domestics, is not, in our view, any violation of the end contemplated by the Constitution of this State. Such a rule will not, in its general operation, interfere with the business or social condition of our own citizens.

It is insisted by the learned counsel for the petitioner that the provision of the eighteenth section of the first article of the Constitution of this State—that "neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State"—is merely directory to the Legislature; and until some act is passed by that body to give effect to this constitutional provision, it remains dormant and inoperative. In support of this view, we are referred to the case of *Graves and others v. Slaughter*, (14 Peters, 449,) and to the opinion of Mr. Justice Anderson, in the case of *Perkins*, (2 Cal. R., 424, 455.)

The case reported in *Peters* was a suit upon a promissory note given for slaves introduced into the State of Mississippi as merchandise. The Constitution of that State provided that "the introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833," with an exception as to such as may be introduced by actual settlers previous to the year 1845. Mr. Justice Thompson who delivered the opinion of the Court, said: "This obviously points to something more to be done, and looks to some future time,

not only for its fulfillment, but for the means by which it was to be accomplished."

It will be seen that the provision regards the *introduction* of slaves for certain purposes, and that it does not, either expressly or by logical deduction, declare the consequences of its violation. Whether the slaves thus introduced were to be free, or whether the person who introduced them should be punished criminally, cannot be known from the provision itself. This provision, from its language and the purpose to be accomplished, could only depend upon future legislation to carry it into effect. It did not, in and of itself, and by its own innate force, operate upon the State of the slave, *after* being introduced into the State.

But the provision in our Constitution is entirely different, both in its language and in the logical deductions flowing from it. It is negative and restrictive in its terms and effect, and by its own force accomplishes the end aimed at. It operates directly upon the state of individuals within our own territorial limits, and provides that the state of slavery should not exist therein. And when the state of slavery is abolished, then each individual is placed upon an equality, and in the contemplation of the Constitution, equally free, with all the incidents necessarily attached to the state of freedom. This provision of the Constitution was operative from the time the other provisions became operative. It was not a provision addressed solely to the legislative conscience, and dependent upon future legislation to carry it into practical effect.

It is difficult to conceive how a negative and restrictive provision of the Constitution can be merely directory. When power is withheld, or a certain state prohibited, the provision must, from the very nature of the case, be conclusive. True, such a provision may be addressed solely to the Legislature, or to the Executive, and not to the Courts. But, when so addressed, there should be something, either in the language of the instrument or in the nature of the provision itself, to show that the judiciary have nothing to do with cases arising under it.

In the case of *Rankin v. Lydia*, (2 A. K. Marsh., 470,) we have an authority in point. The ordinance of Congress for the government of the territory northwest of the river Ohio, contained this provision:

"*There shall be neither slavery nor involuntary servitude in the said Territory, other than in punishment of crimes whereof the party shall have been duly convicted. Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be reclaimed and conveyed to the person claiming his or her labor, as aforesaid.*"

It will be seen, upon comparison, how similar in substance is the language of this provision and that of the Constitution of

this State. The learned Judge who delivered the opinion of the Court in that case, said: "The words of the ordinance are extremely clear and forcible—'there shall be neither slavery nor involuntary servitude'—a strong mode of expressing that every inhabitant *shall be free*; thus using a figure of speech not uncommon, which, by expressing what shall *not*, declares emphatically *what shall be*. If a slave, then, could exist and reside in the Territory, and be there a slave, the ordinance could not be true; for slavery existed, the ordinance notwithstanding." We must think that the case reported in 14 Peters, already referred to, has no application to this provision of the Constitution of California; and that the learned Justice of this Court was mistaken in its application. It will be seen from the separate opinion of the Chief Justice, that he did not take the same view of this authority as did Mr. Justice Anderson. At least, there is nothing in the opinion to show that the Chief Justice relied upon this authority to sustain his decision.

From the views we have expressed, it would seem clear that the petitioner cannot sustain either the character of traveler or visitor. But there are circumstances connected with this particular case that may exempt him from the operation of the rules we have laid down. This is the first case that has occurred under the existing law; and from the opinion of Mr. Justice Anderson, and the silence of the Chief Justice, the petitioner had some reason to believe that the constitutional provision would have no immediate operation. This is the first case; and under these circumstances we are not disposed to rigidly enforce the rule for the first time. But, in reference to all future cases, it is our purpose to enforce the rules laid down strictly, according to their true intent and spirit.

It is therefore ordered, that Archy be forthwith released from the custody of the Chief of Police, and given into the custody of the petitioner, Charles A. Stovall.

TERRY, C. J.—I concur in the judgment, and in the principles announced in the opinion of my associate; while I do not entirely agree with his conclusions from the facts of the case. I think the delay of the petitioner was unavoidable, and that the fact of his engaging in labor in order to support himself during his necessary detention, did not divest his rights under the law of comity, as laid down in the opinion.

## BRANGER AND DRIARD v. CHEVALIER.

A Judge can revoke his certificate, to a settled statement on appeal, during the term at which the judgment was rendered; but after the term has expired it cannot be done. While the term lasts, the Court has power to amend the record. After the term has passed, the record cannot be amended unless there is something in the record to amend by. The settled statement, until certified, is not record.

Where the Judge of the Superior Court certified to an engrossed statement, and subsequently revoked his certificate and ordered the statement to be made conformable to this latter settlement, which order was not entered on record; and the Judge of the Fourth District Court, to which the cause was transferred, ordered that the order of revocation and amendment be entered *nunc pro tunc*, there being no record evidence on which to base such an order: *Held*, to be error.

THIS WAS A MOTION to set aside the submission of the case to this Court, and also the record filed herein.

The facts appear in the opinion of the Court.

*P. W. Shepard* for Plaintiffs.

*N. Hubert* for Defendants.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Motion to set aside the submission of the case and the record.

This case was tried in the Court below, and the statement settled by the referee appointed by the Court for that purpose, and the statement *as settled*, ordered to be engrossed. When engrossed by the attorney of appellant, it was certified to be correct by the Judge of the Superior Court, and filed with the Clerk. The counsel for respondent afterwards moved the Court to strike the engrossed statement from the record, for the reason that it was untrue and contained matters not included in the settled statement. On the hearing of the motion, the Judge revoked his certificate to the engrossed statement, and ordered that the statement should be made conformable to the settled statement. This order was not entered in the record, nor is it certain that it was in writing; but if in writing, it was lost or mislaid. The Judge of the Fourth District Court, after the cases pending in the Superior Court had been transferred to that Court under the provisions of the Act of the Legislature, made an order directing the order made by the Judge of the Superior Court revoking his certificate to the correctness of the statement, to be entered *nunc pro tunc*.

The first question presented is, whether the Judge can afterwards set aside or revoke his certificate to the correctness of the statement.

We think that he may do so during the term of the Court at which the judgment was rendered. But after the time has expired, it cannot be done. The statement, when filed, becomes a matter of record. While the term lasts, the Court has power to amend the record. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. The settled statement, until certified, is not record.

The second question is, whether the order of the Fourth District Court was proper. The only evidence of the order made by the Judge of the Superior Court, revoking his certificate to the correctness of the engrossed statement, was found in the recollection of the Judge, and of the counsel. This was not sufficient. Had the order been made in writing and signed by the Judge, and simply omitted to be entered on the minutes, then the order *nunc pro tunc* would have been proper.

The correct rule would seem to be this: That during the term the record may be amended in any manner so as to be made conformable to the facts. But when the term is past, it can only be amended in cases where the record itself shows the error. In such case there must be record evidence to amend by. (3 Cal. R., 255; 7 Marshall's Ky. R., 237.)

For these reasons the motion is denied.

### WICKS *et al.* v. LUDWIG *et al.*

It is essential to the validity of a judgment that it be rendered by a Court of competent jurisdiction, at the time and place, and in the form prescribed by law.

Where the parties stipulate to try a case before the judge in vacation, and that the judgment shall be entered as if tried at the regular term, and judgment is so rendered, such judgment is a nullity.

No trial can be had or judgment entered, except in term time.

APPEAL from the District Court of the Fifteenth Judicial District, County of Trinity.

This was an action of trespass to recover damages for injuries done by defendants, by cutting away a dam, ditch, and flume, constructed for mining purposes, and the property of plaintiffs.

The defendants, in their answer, among other matters, plead and set up as a bar to this action, a former judgment of the District Court of Trinity county rendered herein, and aver that Ed. Neblett, as sheriff of said county, together with the other defendants, by virtue of a writ of restitution issued on said judgment, diverted the water from the ditch of plaintiffs to that of

defendants; and all of their said acts were in obedience to the commands of said writ, etc.

On the trial, it appeared that said judgment was rendered under and by virtue of a stipulation of the parties, that the Judge of said District Court should hear and try said case in vacation, and that his judgment should be rendered as the judgment of the Court, and should have the same effect as though the case were decided by the Supreme Court.

Upon this showing, the District Court gave judgment for the defendants, from which the plaintiffs appealed to this Court.

*P. L. Edwards for Appellants.*

The judgment put in evidence by the defendants is an entire nullity. It was not rendered by any Court of competent jurisdiction. In fact, it was not rendered by any Court at all; for the Court had adjourned its term until the next regular term, and in the interval, the Judge had no more jurisdiction for the purposes of a trial and judgment than any other citizen. The stipulation to try the case in vacation does not relieve the respondents. Consent may waive or cure error, but can never give jurisdiction. The agreement was not for a submission to arbitrators, but for a trial before the Court, and by a jury. It is incontrovertible there was no Court, no legal jury, no judgment. *Gormond and another v. The People*, 1 Hill's N. Y., 343; *Wians & Lawrence v. Underwood*, 1 Texas, 48; *Doss v. Waggoner*, 3 Texas, 515; 3 J. J. Marshall, 299.

*Upton & Hereford for Respondents.*

The judgment offered in evidence, so far from being a nullity, appears by the record to be a judgment of the District Court, rendered in a cause regularly before it, by complaint and answer, showing a subject-matter within its jurisdiction, and the parties plaintiff and defendant in Court.

Whether the Court committed an error in the course of the trial of that case is a question that can only be determined in that case upon appeal. It cannot be reviewed in the trial of this cause. 5 Wend., 190; 1 Hill, 118.

When a Court has once acquired jurisdiction, its proceedings will be presumed regular, unless the contrary be affirmatively shown, and the record of the Court cannot be attacked collaterally.

If this were a proper subject of review in this case, there is no evidence, except what may be inferred from the stipulation, to show that the trial was not had during a term. The record shows that there was a Court in session, and there is nothing before this Court to impeach this record. It not appearing affirmatively that the trial was had, or the judgment rendered in pursuance of the stipulation, nor that the regular term had been

adjourned, there is not enough before this Court to show even error, much less a want of jurisdiction.

The writ under which the defendants acted, was regular on its face, and the writ alone is a sufficient defence in an action of trespass. 10 John., 138.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The record offered by defendants to support their plea of former judgment was improperly admitted in evidence; that which on its face purported to be the judgment of a competent Court is shown, by the finding and agreed statement, to have been a judgment entered in vacation, upon a trial had by stipulation before the judge and a jury after the adjournment of the Court for the term.

It is absolutely essential to the validity of a judgment that it be rendered by a Court of competent jurisdiction, at the time and place, and in the form prescribed by law. Jurisdiction, in certain cases, is given by our Constitution and laws to the District Courts, which are required to hold regular terms for the trial of causes, commencing at a day fixed, and adjourning from time to time, until the business of the term is disposed of, or the time for holding another term in the same district has arrived. No trial can be had or judgment entered, except in term time. (Smith v. Chichester, 1 Cal., 409.)

It is said that the judgment, being on its face regular, could not be attacked collaterally; but the party aggrieved must pursue his remedy by appeal. Appeals can be taken only from the judgments of a Court; here there is no judgment of any tribunal having jurisdiction; the proceeding was a mere nullity. "There was, in fact, no Court in session, and no judgment could, by law, have been pronounced; and, consequently, it is not only a nullity, in the ordinary signification of the term, when applied to judgments of Courts having no jurisdiction over the subject-matter or the parties, but it is not even the act of a Court, and is therefore not susceptible of appeal, or the subject of revision in an appellate tribunal." (Doss v. Waggoner, 3 Texas, 515.)

Judgment reversed, and cause remanded.

RICE v. CHAUNCEY *et al.*

APPEAL from the District Court of the Fifteenth Judicial District, County of Trinity.

*Latham & Sunderland* for Appellants.

*P. L. Edwards* for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was a bill in chancery to close up a partnership, for the sale of partnership property, and a distribution of the proceeds. The case was, by agreement, referred to a solo referee, who reported the evidence, his findings upon the testimony and a decree. This report was confirmed, and a decree rendered by the District Court in conformity with the report, and the defendants appealed.

The main point relied upon by the defendants is, that the finding of the referee was against the evidence. We have examined the testimony, and we can see no sufficient ground for disturbing the decree of the District Court. The other points in the case are not material.

Judgment affirmed.

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WETZLAR v. THE NORTH-WEST ICE COMPANY.

APPEAL from the District Court of the Sixth Judicial District, Sacramento County.

*Winans* for Appellant.

*Robinson, Beatty & Botts*, for Respondents.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The evidence in this case was not sufficient to warrant the verdict of the jury, and a new trial was properly granted.

Judgment affirmed.

SCANNELL v. STRAHLE *et al.*

The Supreme Court will not disturb the findings of a Court or jury on account of conflicting evidence.

APPEAL from the Superior Court of the City of San Francisco.

*Taylor & Beckh* for Appellants.

*E. D. Sawyer* for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The findings in this case, which are supported by the evidence, fully sustain the judgment; and we have often held that we will not disturb the findings of a Court or jury on account of conflicting evidence.

The testimony offered by defendants, to prove ownership in the property, was properly rejected, because entirely inconsistent with the declarations and admissions of defendants, made at the time the plaintiff was induced to permit the property to remain in their possession until called for.

Judgment affirmed.



# APRIL TERM.



CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT,

APRIL TERM, 1858.

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HALLECK *et al.*, EXECUTORS OF FOLSOM, *v.* GUY.

- A sale of property, under an order of the Probate Court, is a judicial act, and therefore not within the Statute of Frauds.
- A substitution of one bidder for another, at executor's sale, who fails to comply with the terms of sale, cannot effect the validity of the sale. The order directing the sale and the order confirming it, give vitality to the purchase.
- A purchaser at executor's sale, under an order of the Probate Court, cannot refuse to pay the purchase-money on the ground that the notice of sale stated a good title, and that the title was not good. The sale was stated in the notice as a probate sale, the bidder knew its character, the effect of the deed, and is bound to examine the title for himself. In these sales, *caveat emptor* is the rule.
- Where the terms of the sale were, one-half of the purchase-money cash, and the remainder in ninety days, with interest from date of sale, at the rate of one per cent. per month, and the purchaser elected to pay the whole amount down; *Held*, that the purchaser is entitled to a reduction for the interest on one-half of the purchase-money.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

A statement of the facts appears in the opinion of the Court.

*Whitcomb, Pringle & Felton*, for Appellant.  
The defendant relies on the following grounds:

1. The contract of sale is not binding, because there was no subscribing of the contract by the plaintiffs or their agent.

2. That the defendant never bid for two of the lots included in the alleged contract.

3. The plaintiffs advertised to sell as and for a good title, and the title of their testator is not such a title as a Court of Equity would compel a purchaser to accept.

4. The decree is defective in entering credit for the whole amount of purchase-money on the day of sale.

1. It appears by the bill itself that there was no subscribing of the contract, such as is required by our statute. Compiled Laws, p. 200. The mere writing the names of the parties by the auctioneer is not such subscribing as the statute requires. There must be a subscribing as contradistinguished from signing. No mere writing the name of the parties in the body of the instrument satisfies the statute. There must be such subscribing as implies a view of the whole contract, and a signature at the bottom, including the whole. See *Miller v. Pelletier*, 4 ed. Ch. Rep., 102; *Champlan v. Parish*, 11 Paige, 411; *Davis v. Shields*, 26 Wend., 341. See last case for a thorough view of the point.

After the reasoning of the above cases, the point does not seem to require more argument, especially in view of the clause of our statute which provides that the memorandum of the auctioneer shall be sufficient in cases of goods, but is silent in reference to contracts for real estate. "*Expressio unius est exclusio alterius.*"

The plaintiffs seek to avoid this difficulty by taking the ground that this was a judicial sale, and not within the statute. But neither upon principle or authority can this be so. The doctrine contended for, they seek to derive from the case of *Attorney-General v. Day*, 1 Vesey, 218, where Lord Hardwicke held that a master's sale in equity was not within the statute.

The reason in those cases is obvious. In a sale ordered out of chancery, the Court is the vendor, and the Court is always bound to its own contracts. The master is merely the officer of the Court making the title, after the confirmation by the Court. *Anderson v. Foulke*, 2 Har. & Gill., 358.

The Court is strictly the vendor. The sale is a part of the proceedings in a case, and the purchaser makes himself a party thereto by his bidding. The Court holds him to his contract by committing him for contempt in case he refuses to comply with his bid. *Wood v. Mann*, 3 Sumner, 326. The necessity for the statute is altogether wanting where the whole proceeding is conducted by the officers of a Court of Chancery, and fraud is out of the question. Now, all this reasoning fails in the case of a sale by executors. They are the agents of the will. They are the vendors. The Probate Court is not, in any sense, a vendor.

Nor can it enforce performance against a purchaser, by contempt, because the sale is the sale of the executor and not the sale of the Court. See *Smith v. Arnold*, 5 Mason, 414.

It is true that a confirmation of sale by the Probate Court is required by our statute, but such a provision does not make the judicial sale of a Court of Chancery. The Probate Court is a Court of inferior jurisdiction and of limited powers. It does not summon all incumbrancers or persons in interest to settle their rights. It has no concern with, and gives no protection to a purchaser. It is simply the agent of the deceased to see that his interests are protected, and his wishes enforced.

At the confirmation it is not required to give notice of the hearing. It cites no person to be present, and hence none are barred by its act. It simply passes upon the regularity of the proceedings of the executors, whether they have sufficiently protected the interests of their testator. The confirmation is a proceeding between the executors and the Court—merely an approval of them. It has no further authority or scope.

Now, does such a confirmation bring the proceedings within the analogy of sales in chancery as described by Lord Hardwicke? Clearly not, we contend. The essential element of chancery sales is wanting here. The purchaser is not reached by the proceedings in the case, his interests are not protected, he is in no sense a party, and cannot be held by any process in contempt. In chancery sales a bill for specific performance is unnecessary. The proceeding is a motion, the ground of the jurisdiction on motion against a purchaser being, that he has become a party to the action, and that the Court has sold to him. If this were, properly speaking, a judicial sale, the plaintiffs would not be pursuing their present remedy in another Court.

The plaintiffs insist that there is no sale until the confirmation, because the executors could not be held liable in case of a rejection. The premises are true, but the conclusion does not follow. There is a contract of sale qualified always by the law, which allows the Court to confirm or reject. That enters into the contract. The executors could be sued in case they omitted to report their sale. By the sale and a proper subscribing they bind themselves to the purchaser to report the sale to the Court and to convey to him, unless the Court refuses to confirm.

Certain Pennsylvania cases (4 Barr, *Gunnison's adm'r.*) have held that executor's sales are judicial sales and not within the statute. But these decisions are based upon the analogy to sheriff's sales, which latter the Pennsylvania Courts, taking a wrong direction, have held to be judicial sales, and not within the statute. Executor's sales are just as much judicial sales as sheriff's sales, but no more; and the great mass of authority is

against the doctrine that sheriff's sales are judicial sales, as admitted by the plaintiff's counsel in argument.

In *Simonds v. Catlin*, 2 Caines, p. 64, Chancellor Kent holds that sheriff's sales are within the statute, and says, *arguendo*, that probate sales are also within the statute.

But this Court seems to have already decided in *Abell v. Calderwood*, 4 Cal., p. 90, that a contract for the sale of lands is in all cases within the statute. The Court expressly rejects the reasoning of Lord Hardwicke, which led him to the doctrine that chancery sales are not within the statute. To dispense with the requirements of the statute here, would be to depart from a very salutary rule, laid down in *Abell v. Calderwood*, after mature reflection.

2. As to subdivisions eight and nine, of water-lots three hundred and sixty-seven, three hundred and sixty-eight, three hundred and seventy-five, and three hundred and seventy-six, the defendant insists that there is no valid agreement to bind him. Some days after the bidding he consented to take those lots, but on examination of the title he rejects them. He is not bound by the substitution. If this proceeding were in the course of a judicial sale, the original bidder would have been released on motion, and the new purchaser substituted. But this substitution is in no degree analogous to that proceeding, and in fact shows conclusively the difference between these sales and the proper judicial sales.

Here, in the first place, is no release of the first bidder, which in the chancery proceeding would have been accomplished. The scratching out of the name of the first bidder by Mr. Billings, or Mr. Guy, or both of them, is not equivalent to releasing him on motion, nor is it effectual, perhaps, to bar him from claiming his bid. And in the second place, the substitute is not bound as a party, as he would have been by a motion in chancery, that he be substituted for the retiring bidder.

And again, this substitution did not make a sale at public auction, which the probate law requires. Defendant might have bid more or less at the sale, other parties might have bought. His agreement to take the lots was not in any sense a bid at public auction; it was a private sale. (See *Heydenfeldt v. Pickering et al.*) Here there was no pretence of any agency. The defendant was a new party, present himself at the sale, not bidding off these lots but consenting to take them three days afterwards, and when the original bidder had made default.

3. Appellant insists that the plaintiffs do not offer him such a title as a Court of Equity would compel a purchaser to accept.

In this question, the apparent difficulty in the way of the defendant is, that executors are merely trustees, and cannot convey more than the interest of their testator; and a purchaser is bound to know the law, that our statute provides that executors'

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deeds shall be held to convey "all the right, title, and interest of the deceased." But the point of the defendant is, that they advertised to sell as and for a good title, and they cannot compel specific performance where they do not substantially comply with what they contract for. It is true that, ordinarily, the purchaser at an executor's sale gets nothing but the interest of the deceased, and has notice of that. But where the vendors, instead of advertising in the ordinary way to sell such interest, advertise to sell the land itself, thereby holding themselves out to sell a good title, the purchaser has a good right to presume one of two things: either that the testator by his will had made provision for the removal of incumbrances, and that they have accordingly perfected the title, or that they have examined the title, and for the purpose of making a good sale undertake to sell as and for a good title. If they advertise in the ordinary way to sell what they are really selling, viz.: "all the right, title, and interest of the deceased," purchasers are on their guard, and buy with notice. If they depart from that course, and advertise to sell the land itself, they are putting themselves in the position of persons selling at judicial sales, where the purchaser has a right to demand a good title.

In *McDonald v. Hanson*, 12 Ves., 277, the Master of the Rolls, Sir Wm. Grant, held, "If assignees in bankruptcy choose to advertise that they have not a good title, or that they will sell only such title as they have, that is another thing. But if they advertise in the common way, there is no reason why they should not be bound as other persons." Bill for specific performance dismissed.

In *Smith v. Arnold*, 5 Mason, 414, "the advertisement was of all the right and title of the intestate," and such is the form of advertisement where agents or trustees are selling, and do not wish to be held to convey a good title. See, also, *Anderson v. Faulke*, 2 Har. & Gill, 358.

The above case of *McDonald v. Hanson*, is a complete answer to the apparent difficulty above suggested, arising from the fact that executors cannot sell more than the interest of their testator. That was the sale of an assignee in bankruptcy, completely analogous to an executor's sale. An assignee, like an executor, is a special agent, who of course can sell no more than the bankrupt's title, and purchasers must ordinarily take notice of the limit of his power; but he is denied a specific performance where he has advertised as these executors have done, unless he gives a good title.

In *Pope v. Simpson*, 5 Vesey, 145, Lord Longborough held a contrary doctrine, and said that "purchasers have no right to expect more than that the assignees should deliver over such title that the bankrupt has," but the case has been repeatedly

repudiated and overruled. See, particularly, the case of *White v. Foljambe*, 11 Vesey, 344.

Lord Eldon, after entering his protest against the doctrine of *Pope v. Simpson*, ("if," says he, "that case really does contain any such doctrine,") goes on to say, "That assignees, under a commission of bankruptcy, may sell under a special contract such estate as the bankrupts had, I admit. But if the assignees exhibit to sale a freehold estate of inheritance, not marking by the contract that they mean to sell nothing more than it shall turn out the bankrupt had, the agreement is to sell the inheritance, free from incumbrance; and there is no principle which can protect the assignees if they do not inform themselves before they propose a sale, what is the real nature of the title."

The true doctrine is well laid down in the note to *White v. Foljambe*, 11 Vesey, 337, as collected from the cases: "In general the assignees, like other vendors, are bound to make out a good title to the bankrupt's lands before they can compel a vendee to complete his purchase. But the assignee may sell such title as the bankrupt had." The same rule holds good in sales by guardians, a precisely analogous case. See matter of *Browning*, 2 Paige, 64. So, also, in all partition sales, the doctrine is universal, and is most reasonable.

We are at a loss to see in what respect an auction sale by an executor differs from an executor's private sale. In reality, there is no more difference than between the public and private sale of an ordinary vendor. We have, then, a case completely in point in *Garnett v. Macon*, 2 Brockenborough, p. 213, an elaborate case of Ch. J. Marshall, who says: "But the person who demands specific performance must be in a capacity to do substantially all that he has promised before he can entitle himself to the aid of this Court." This was a sale by an executor. Specific performance denied on account of defect of title. See, also, *Veeder v. Fonda*, 3 Paige, 97.

Now, let us see what defects of title will induce a Court of Equity to withhold its assistance from a suitor. They will often refuse a specific performance, where an action for damages at law might be maintainable. See *Denne v. Cooper*, 1 Ves., Jr., p. 565, note A. The interposition to decree a specific performance is withheld, unless the Court is carrying into effect what was clearly the understanding and will of both parties. The vendor's title, therefore, must be above suspicion. "Whenever a rational doubt exists with respect to a title, a Court of Equity (though it inclines to think the title good) will not compel a purchaser to accept it. See note 3 to *Rase v. Callan*, 5 Ves., Jr., 189; also, Lord Longborough's opinion in that case, and the notes of Summer, and cases collected. There is much elaborate learning upon this subject in *Sugden on Vendors*, vol. 1, pp. \*507 and \*538. He says that though a title is certainly either good or

bad, that a Court of Equity does not go into the consideration of that question, and examine completely into the merits of a title. It is enough to deny a specific performance if it finds that there is a doubt about the validity of the title, and repeatedly the Court rejects a title, which it believes to be good, if it is not a reasonably clear marketable title"—p.\*538. "I should be very unwilling to make a man purchase a lawsuit"—Lord Longborough; see, also, *Jackson v. Edwards*, 22 Wend., p. 509; *Seymour v. De Lancey*, 1 Hopk., 436.

4. The fourth point needs no argument. The Court is referred to the terms of sale as expressed in the bill, and to the prayer of the bill, and then to the form of the decree. "Half cash and half at ninety days, with interest at one per cent. per month," is very different from all cash.

*Gregory Yale* for Respondents.

Is the plea of the statute good?

The provisions of the statute which have, it is said, been violated, and by reason of which, as charged by the defendant's counsel, in argument, though not in his pleadings, there is no cause of action on the part of the executors, are no doubt, though not specifically pointed out, the sixth and eighth sections of the act of the nineteenth of April, 1850, concerning fraudulent conveyances and contracts, as follows:

"Section six—No estate or interest in lands other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing."

"Section eight—Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in any lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made."

Under this statute, the argument is that no interest in land can be granted except by deed in writing; and it is true as a general principle that no interest can be granted, by deed in writing, unless the party granting it possesses it himself. The word "granted," in this section, is equivalent to "transfer;" and no one can transfer an interest unless he possesses it. He must own it before he can sell it.

So the word "contract," in the eighth section, refers to a party competent to enter into one for the sale of land. The

sixth section refers to an actual conveyance by deed—an executed agreement; the eighth, to an executory agreement binding the obligor to make a conveyance by deed.

But the question is, do these sections embrace the case of a sale of land by an administrator, or an agreement by an administrator to sell land? It is contended, by the respondents, that an administrator has no interest in the land of his intestate, by which he can "grant" an interest to another by a conveyance; nor can he make a "contract" for the sale of the land of his intestate.

This position embraces two distinct points:

1. That the administrator has no such interest in the land capable of being granted.

2. That he can make no contract to grant it.

The first point is established by the provisions of the statute to regulate descents and distributions, determining the legal title to be in the heir at law, subject to the payment of debts; and by the statute relating to the estate of deceased persons, requiring an administrator to make an inventory of the real estate, and authorizing the sale thereof by the Probate Court, for the payment of debts, in case the personal property is insufficient; and by the statute relating to the appointment of guardians, giving them the control of the real estate of their wards, under certain conditions; and also by the statute concerning escheated estates, where no heir capable of inheriting is left, vesting the estate in the state.

The interest of the administrator is special, and purely for the purpose of administration, rather as the representative of creditors, where there are any, than of the distributees. He must take into possession all the estates of the deceased, real and personal. (Act relating to estates, § 194.) And actions for the recovery of any property, real or personal, or for its possession, must be brought in the name of an administrator. § 195. But this authority to maintain an action for the recovery of real estate does not vest the title in the administrator. The title is still in the heir.

Chief Justice Marshall states the principle with his usual clearness, in a case from Ohio. He says, that "the lands of an intestate descend not to the administrator, but to the heir: they vest in him, liable, it is true, to the debts of his ancestor, and subject to be sold for those debts. The administrator has no estate in the land, but a power to sell under the authority of the Court of Common Pleas." *Bank of Hamilton v. Dudley's Lessee*, 2 Pet., 522-3.

The Court has followed the common law principle recognized by Chief Justice Marshall, and extended its operation so as to embrace personal property as well as real. *Beckett v. Selover*, 7 Cal. R. 215.

The special interest of the administrator as thus solemnly adjudicated is nothing more, as respects either the real or personal estate, than a lien in behalf of creditors, which he asserts as against the title of the heir, upon a given state of facts, and in the manner specially pointed out by law.

The same doctrine is applicable to executors, except where they have the authority to sell; and then they are but trustees, whose authority is limited by the terms of the testament.

When a devise of real estate is made, the devisee takes the title, under the will, subject to the debts and charges of the deviser.

Even in a case where the testator devised real estate subject to mortgages, to his executors in trust, to sell the same and divide the proceeds among his children, it was held that the executors had no estate in the land, but a mere power in trust, and that all the devisees were necessary parties to a suit against the executors respecting such real estate. *Campbell v. Johnson et al.* 2 Sand. Ch., 149.

In this case there is no pretence that the respondents derived any greater power over the land by the will of Folsom than in an ordinary case, where the authority of an executor over the real estate is limited by law.

An administrator or executor, then, having no interest to grant by deed in writing, under the sixth section of the Statute of Frauds, the other branch of the case is presented.

2. That an administrator can make no executory contract within the eighth section, to grant the real estate of his intestate.

It may be stated as a general principle, that an administrator can make no contract to bind the assets of the estate.

In *Alsop v. Mather*, 8 Conn., 586, it is stated as a general rule that "an administrator is an agent who is created, and whose powers and duties are prescribed by law. The extent of his liability is defined by the condition of his bond." In *The Bank of La. v. Dejean*, 12 Rob., 19, the Court say:

"We have repeatedly held that, as a general principle, an administrator cannot create any liability on the estate by his contracts." *Wightman v. Townroe*, 1 Maule & S., 416, contains an opinion of Lord Ellenborough, illustrative of the general common law principle. *Wise v. Smith & Buchanan*, 4 Gill & John., 299, 304; *Callis v. Tolson's Executors*, 6 Ib., 91; *Gilman v. Weir*, 8 Ala., 72; and *Nelson v. Woodbury*, 1 Greenl., 230, are further illustrations of the general rule.

If an administrator can make no contract to bind the assets in his hands, how can he make an executory agreement in writing to sell the real estate of his intestate under the eighth section, to a particular individual? The very point has been decided in respect to such a contract, under the Statute of Frands,

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in the case of *King v. Gunnison's Adr.*, 4 Barr, 171. Judge Coulter, in the opinion delivered by the Court, says :

"A written contract between the administrator and the purchaser would be without value before the sale was confirmed, and totally useless when it was confirmed. The statute was not designed to operate on judicial sales, but upon contracts in the current of business, and sales between individuals."

No other case has been noticed where such an objection has been made to a probate sale till the present. In New York, it has been uniformly held, that such a contract would be void for two reasons :

1. The administrator has no authority to make it ; and,
2. Such a contract would be void as against the policy of the law, in preventing fair bidding at a public sale.

In the case of *The Overseers of Bridgewater v. The Overseers of Brookfield*, 3 Cow., 299, the single question was, whether an equitable estate had been acquired by virtue of a contract with an administratrix, so as to entitle a party to a settlement.

In the case of *Herrick v. Grow & Brown*, 5 Wend., 579, the validity of a bond of an administrator for the sale of land was directly presented.

The authorities referred to by the Courts in the two cases immediately preceding, to sustain their position that such contracts were against the policy of the law, and void, because their direct tendency was to prevent fair competition at a public sale, were *Jones v. Caswell*, 3 John. Cas., 29 ; *Doolin v. Ward*, 6 John., 196, and *Wilbur v. How.*, 8 John., 346.

So, where an act of assembly authorized a sale of real estate by a trustee, to be appointed by the Orphan's Court, the Court to prescribe the time, place, and manner of sale, it was held that the act contemplated a future sale, and also a public sale, and that a private sale before the passage of the act, was invalid, notwithstanding it was approved by the Orphan's Court. *Ellet v. Paxson*, 2 W. & Serg., 418.

If the statute does not apply to the case of an administrator, because he is incompetent to make the contract, does it apply to sales by order of the Probate Court ?

This is only the same inquiry in another form ; and the adjudications upon this point may be treated only as a different class of cases upon the same identical subject. It is contended, then, that the Statute of Frauds does not apply to such sales ; but that an administrator's sale, under our statute, by order of the Probate Judge, is not within the Statute of Frauds.

The proceedings necessary to be taken by an administrator to procure the order of the Probate Court, to sell the real estate of his intestate for the payment of debts, and the action of the administrator under the order, including the conveyance to be made by him after the confirmation, may be described as the means

prescribed by law for divesting the heirs of their title to the land. This is the result and the only means by which it can be accomplished; although the primary object is to pay the debts of the intestate. It is a proceeding *in rem* against the estate of the decedent, and jurisdiction attaches *quoad* the thing. Duval's Heirs v. The P. & M. Bank, 10 Ala., 652.

The proceeding being in its very nature special, under a particular law, a general statute, like the act to prevent frauds and perjuries, requiring contracts for the sale of land to be in writing, has no application to it.

The very first section of the seventh subdivision of the act relating to estates, under the head of "sales of property by executors or administrators," contains a declaration inhibiting all sales made by an administrator, unless under the order of the Probate Court. This section alone is a sufficient answer to the whole question about the Statute of Frauds. The language is:

"No sale of any property of an estate shall be valid, unless made under an order of the Probate Court." § 148, W. Digest, 406.

Petitions for the sale of personal property, by the administration, must be in writing, (§ 149,) and the sale must be at public auction, unless, for good reason shown, the Probate Judge shall order a private sale, but no private sale shall be effectual for any purpose until the same shall be approved by the Probate Judge. § 152.

This Court makes no distinction between the title to the real and the personal property. The title to each kind of property is in the heir and not in the administrator. Beckett v. Selover, 7 Cal. R.

But when the personal property in the hands of the administrator shall be insufficient to pay the allowance of the family and all debts and charges of the administration, the administrator may sell the real estate for that purpose, by order of the County Judge. § 154.

An order to sell real estate, without making the heirs a party, would be a nullity. Bloom v. Burstick, 1 Hill. Should the administrator neglect to apply for an order of sale whenever it may be necessary, any person interested in the estate may make application therefor, in the same manner as an administrator—notice being given to him before the hearing. § 164.

If the argument of the defendant's counsel is correct in principle, that a sale of an administrator is void, unless he make a contract in writing with the purchaser *in futuro*, it applies also to a sale under this section, when the application is made by a creditor. The contract would then have to be made with a creditor, he binding himself to sell that which he does not possess, and the purchaser, of course, agreeing to buy that particular thing. The *reductio ad absurdum* could not go further; so

completely evident is it, that the sale is under judicial authority, exercised in a prescribed form, and not the act of an individual.

Of the proceedings to confirm this immediate sale to the defendant, the complaint avers that he had notice, and made objections thereto, and that the same was confirmed to him, as the purchaser, by order of the Court, on the twenty-ninth of December, 1856. These averments are not denied in the answer.

To recur to the inquiry, then, after having referred to the prescribed method to be adopted by the Court, upon the application of the administrator to divest the heir of title to the estate, by subjecting it to the lien of his ancestor's debts, does the Statute of Frauds apply to such sale?

The inquiry is already answered in the negative, where it is first made. The class of authorities there alluded to establish the point that these sales are judicial, and not within the Statute of Frauds.

Chief Justice Marshall's opinion has already been cited, to show that the title of the real estate is in the heir, and not in the administrator. He says, in the same case, and in the same immediate connection, that the order of the Court is a prerequisite, indispensable to the very exercise of the power of the administrator to sell. In that case, the law conferring jurisdiction upon the Court to authorize the sale of real estate was repealed, between the application by the administrator and the sale. The administrator, nevertheless, proceeded to sell. Upon that state of facts the Supreme Court held that, if the law which authorized the Court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but is the exercise of legislative power which every Legislature possesses. "The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the Legislature." The deed of the administrator was held to be void. *Bank of Hamilton v. Dudley's Heirs*, 2 Pet., 523.

The same Court, in *Grignon's Lessee v. Aster et al.*, 2 How., 843, say: "There are no judicial sales around which greater sanctity ought to be placed, than those made of the estates of decedents, by order of those Courts to whom the laws of the States confide full jurisdiction over the subjects." This language is repeated, with emphasis, by Mr. Justice Daniel, in the judgment of the Supreme Court, in *Sargeant et al. v. The State Bank of Indiana*, 12 How., 386, 387.

In Pennsylvania, numerous cases occur, pronouncing the sales of Orphan's Courts to be judicial. In *King v. Gunnison's Administrator*, 4 Barr, 172, Mr. Justice Coulter says: "It has been decided, by this Court, that a sale made by an administrator, in pursuance of an order of the Orphan's Court, is a judicial sale,

and that the rule of *caveat emptor* applies." In *Lockhart v. John*, 7 Barr, 139, the same Justice, in referring to the irregularities of such a sale, says: "None of these acts, nor any other act on the subject, declares that the sale shall be void for such omissions, and, as the Court had undoubted jurisdiction to decree a sale, we cannot hold it to be void, but must consider it valid, as a judicial sale, made under a decree of the Orphan's Court, having complete and full jurisdiction, and not subject to reversal, in a collateral suit." In an earlier case, decided by Mr. Justice Rogers, in 1835, where it was held that there was no warranty at a judicial sale, he says: "But, it is said that a sale by the administrator is not a judicial sale. But, we conceive that a sale by an administrator, under an order of the Orphan's Court, for the payment of debts, is a judicial sale; and that the principles which govern the one are applicable to the other. See *Bashore v. Whister*, 3 Watts, 494.

The doctrine of this case is expressly affirmed by Mr. Justice Rogers, in 1849. *Robb v. Mann*, 1 Jones, 305.

In Louisiana, the sale of the property of a succession is expressly held to be a judicial sale. *Jones' Administrator v. Read et ux.*, 1 La. An. R., 200.

In Texas, such a sale is declared to be judicial, and to operate *in rem*. *Lynch v. Baxter*, 4 Tex., 437.

In Alabama, where the vendee, under a sale by commissioners appointed by the Orphan's Court, attempted to get rid of his liability under a sale, the Court say: This case stands upon higher grounds than the inability of the vendee to take advantage of the defective execution of a power, conceding that such was the fact, against the will of the agent's principal, desirous to affirm it. This is a judicial sale. It is, in effect, a sale made by the Orphan's Court, acting for the heirs and those interested in the estate, and the rule *caveat emptor* applies in all its rigor." *Worthington's Adm'r v. McRoberts*, 9 Ala., 300-1.

The opinion of Judge Story, in *Smith v. Arnold*, 5 Mason, 420, has been referred to by the defendant's counsel to establish a contrary doctrine. The principle deduced from the case is in perfect harmony with the other authorities. Had the administrator been required by the statute of Rhode Island, under which the decision was made, to report his sale to the Probate Court for confirmation, it would, in the opinion of Judge Story, have been a judicial sale. He says:

"It is unnecessary to rely upon the analogies of chancery practice, in order to make the sale of an administrator, under an order of the Probate Court, a judicial act. The statute is alone sufficient for that purpose. Such cases, therefore, as the *Attorney General v. Day*, 1 Vesey, Sen., are not relied upon as furnishing any reason for the rule."

The statute of this State makes the confirmation of the sale by

the Court indispensable. The order to the administrator is the pre-requisite, and without the subsequent sanction of the Court of the act of the administrator, it is simply a nullity. So held in *Rea v. McEachron*, 13 Wend., 465, under the New York statute, although it was offered to be proved that the sale was *bona fide*; that a full and fair price was paid by the purchaser, and that the proceeds were applied to the payment of the debts of the intestate. In that case, the heirs recovered the real estate in an action of ejectment. And a failure on the part of the Court to confirm the sale, under the statute in Alabama, will annul what has been done by the administrator, and release the purchaser from his bid, in the same manner as if the Court had so declared *in totidem verbis*. *Duval's Heirs v. The P. and M. Bank*, 10 Ala., 636.

Unless, as in New York, the Chancellor had the right, under the statute, to confirm the sale upon the application of the purchaser, in case the Surrogate neglected to do so. 13 Wend., 465.

The remaining question relates to the objection to the form of the decree, requiring the defendant to credit the mortgage as of the day of sale.

When was the sale made? On the 14th of November, 1856, and confirmed on the 29th of December. To what day did the confirmation relate? Certainly to the day of sale. The printed terms of sale, as attached to the transcript, show that the purchasers became entitled to the rent from the day of sale, when confirmed. This fixed the ownership, and was a matter of express contract by the defendant as a purchaser.

Such is the rule recognized at law and in chancery. In determining this question upon an action of assumpsit for rent, by a purchaser under a sale, Judge Tucker, President of the Court of Appeals in Virginia, says, he had not the slightest doubt of the right of the purchaser to recover the rent. *Taylor v. Cooper*, 10 Leigh, 318. He says, that where the sale is confirmed, "the confirmation relates back to the sale, and the purchaser is entitled to everything he would have been entitled to, if the confirmation and conveyance of title had been cotemporaneous with the sale." This was a sale in chancery; but the same rule applies to an administrator's sale. The question is examined at length by Mr. Justice Rogers, in 1 Jones, 304, and he comes to the conclusion, that a purchaser is the owner from the day of sale; and should damage ensue to the property by fire, the purchaser, and not the estate, would bear the loss.

The confirmation of the sale fixed the liability of the defendant, and his effort now to get rid of that liability, amounts, in effect, to a collateral impeachment of the decree of confirmation. This, he is not permitted to do. The authorities are overwhelming, denying the party the liberty of impeaching the decree of a Probate Court in a collateral proceeding. *Grignon's Lessee v. Aster*, 2 How., is an instance.

In *Fox v. Mench*, it is expressly held, that "if the purchaser has a complaint, he ought to make it to the Orphan's Court before confirmation." 3 W. & Serg., 446.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was a bill to compel the defendant to pay the sum bid by him for certain lots sold by plaintiffs, as executors of Joseph L. Folsom, deceased, under an order of the Probate Court. The Court below rendered a decree for the plaintiffs, and the defendant appealed.

The first point made by the defendant is that the sale was not binding because there was no subscribing of the contract by the plaintiffs or their agent. The fate of this objection depends upon the question whether sales by executors and administrators, under our probate system, are judicial or ministerial. If judicial, the contract need not be in writing, subscribed by the parties. The Statute of Frauds does not apply to such a case, the sale being made by the Court.

The administrator, or executor, is under the control of the Probate Court. In the sale of property he is the moving party in behalf of creditors, but acts subject to the orders of the Court.

The order of the Probate Court directing the sale of the real estate of the deceased, is a judicial act. It is, in substance, similar to a decree in chancery for the sale of specific property. The order of the Probate Court may not, in specific terms, describe the exact property to be sold; but it still has reference to the property already described upon its records, and is therefore, in effect, the same as a decree in chancery. The administrator, or executor, in making the sale, does the *particular* act which the order of the Court itself directs him to perform. The Court determines that specific property *must* be sold, and, by its order, directs the administrator to sell the same according to law. The mode of the sale is pointed out by express statute. When sold, the report of the sale is made by the administrator to the Court, and unless confirmed by order of the Court there is no binding sale, and no title can pass to the purchaser. To be valid, the sale must first be ordered by the Court, and afterwards confirmed by it. The order for the sale, and the order of confirmation, are both judicial acts; and these two concurring, make the sale a judicial sale, and, therefore, not within the Statute of Frauds. In making the sale itself, the administrator acts for the Court and under its orders. He receives the bids and returns them like a Master in Chancery, into the Court for its consideration. The Probate Court is the guardian of the rights of all parties interested in the estate, and acts for all.

But, in a judgment at law, there is no direction by the Court itself that any specific property shall be sold. Judgment is

given for a specified sum, for which execution *may* issue, and such property of the defendant sold as the sheriff may levy upon. What particular property will be sold, depends upon the ministerial act of the sheriff; and the sale is made by him and the title passed to the purchaser, without the action or confirmation of the Court.

It is true that there is a difference in the *mode* of enforcing a sale ordered by a Court of Chancery, and that of a sale by order of the Probate Court. But this difference in the mere mode does not affect the character of the sale itself. When a sale is made under a decree in chancery, the bidder may be committed for contempt if he refuses to comply with his bid. (*Woods v. Mann*, 3 Sumner, 326.) The Court can summon all parties interested and settle their conflicting claims to the property itself.

If we concede that the Probate Court cannot commit the bidder for contempt, when he fails to comply with his bid, this does not change the character of the sale. Nor does the fact that the Probate Court cannot settle conflicting claims to the property have any such effect, for the reason that the Court can only order a sale of the interest of the deceased.

The counsel for defendant has referred us to the case of *Smith v. Arnold*, (5 Mason's R., 414.) In that case, Mr. Justice Story held that a sale by an administrator, under the law of Rhode Island, was not a judicial sale. But the principle upon which the decision rested, and the reason given by the Judge, sustain the view we have taken.

"In the case of an administrator, the authority to sell is, indeed, granted by a Court of Law. But the Court, when it has once authorized the administrator to sell, is *functus officio*. The proceedings of the administrator never come before the Court for examination or confirmation. They are matters *in pais*, over which the Court has no control."

There is doubtless some conflict of authority in reference to the character of probate sales of real estate. But under our system, which requires both the order of sale and the confirmation by the Court, to make the sale valid, we think there can be no reasonable doubt. These sales are considered judicial by the following authorities: 2 How. U. S., 312; 12 How. U. S., 386; 4 Barr, 172; 1 Janes, 305; 1 La. An. Rep., 200; 4 Texas, 437; 9 Ala., 300. The case of *Abel v. Calderwood*, 4 Cal. Rep., 90, is not opposed to this view.

The second point made by the counsel of defendant is that the defendant never bid for two of the lots included in the alleged sale.

It appears that these two lots were struck off to another bidder, who failed to comply with the terms of the sale; and, that his name was erased on the list of the auctioneer, and the de-

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fendant wrote his own name in the place of that of the first bidder. This was done about three days after the bidding, and before the report of the sale was made to the Court and confirmed.

We can see nothing in this objection. The mere substitution of one purchaser for another cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give vitality to the purchase. These orders are both required to be recorded. (§ 171.)

The third objection made by the defendant is, that the plaintiffs advertised to sell as and for a good title, and that the title was defective. The notice of sale stated that the executors, being thereto authorized by order of the Probate Court, would sell to the highest bidder, at a time and place stated, "the within described property, being part of the real estate of the said Joseph L. Folsom, deceased," describing the property, and stating the terms of sale.

The only effect of an administrator's deed is to convey to the purchaser the title of the deceased. Such a deed can contain no warranty of the title. The purchaser must know the law. The notice was of a probate sale. The bidder, therefore, knew the character of the sale, the effect of the deed, and was bound to examine the title for himself. The language of the notice put him upon his guard. In these sales, *caveat emptor* is the rule. (4 Conn., 513; 13 S. & M., 101; 9 Ala., 299; 5 Black., 277; 4 Barr, 172; 9 Texas, 553; 3 Watts & S., 446.)

The fourth and last objection made by the appellant is to the form of the decree. The price of the property purchased by the defendant amounted to fifteen thousand eight hundred and fifty dollars. The defendant held a mortgage upon the lots, and the amount of his mortgage exceeded the amount of his bids. The mortgage-debt was drawing two and a half per cent. interest per month. By the terms of the sale, one-half of the purchase-money was to have been cash in hand, and the remainder in ninety days, with interest from the date of the sale, at the rate of one per cent. per month. The bidder had the privilege to pay the whole sum on the day of sale. The decree of the Court directed the entire amount to be credited upon the mortgage, as a payment made on the day of sale. This we think was an error.

The bidder who elected to pay promptly, was entitled to a deduction for the interest on one-half the purchase money. The defendant's mortgage-debt was drawing two and a half per cent. per month, and the proceeds of the sale were dedicated to the payment of his debt. But, by the terms of the sale, he was compelled to give more for the property than he otherwise would have been. The executors gave him property in place of *cash*, but they charged him *cash* instead of *credit* prices for it, when, at the same time, the sale was partly on credit.

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The decree must be modified, and the case remanded to the Court below, with directions to modify the decree in accordance with this opinion, without costs on appeal.

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### CANY v. HALLECK *et al.*, EXECUTORS OF FOLSOM.

Where a party employed receives a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. And to overcome this presumption, he must show an express agreement for extra pay, otherwise he cannot recover.

APPEAL from the Superior Court of the City of San Francisco.

This was an action to recover of the defendants, as executors of Joseph L. Folsom, deceased, the sum of \$22,084, for extra services rendered by plaintiff for Folsom in his lifetime.

Plaintiff was employed by Folsom sometime in the year 1852, as collector of rents of Folsom's estate, for which service he received \$250 per month. He continued in that capacity until July, 1854, receiving said monthly salary. On the nineteenth day of July, 1855, Folsom died, leaving a large estate, and by his will appointed the defendants his executors. On the sixth day of December, 1856, the plaintiff presented to the defendants, as such executors, for their allowance, his account, "for services in superintending certain real estate, (described in the account, and valued at \$552,100,) preventing squatters from settling on the same, and expelling squatters therefrom, and in securing and retaining for Folsom the exclusive possession thereof, during the years 1852, 1853, and ending July, 1854, charged at the rate of four per cent. upon the value of said property."

This account was properly verified. The executors refused to allow the same, or any part thereof, and thereupon the plaintiff brought this suit. The defendants had judgment in the Court below, and plaintiff appealed. On the trial, certain instructions were given by the Court to the jury, which appear in the opinion of the Court.

*Hall McAllister* for Appellant.

The charge of the Court was erroneous, and entirely misled the jury.

The Court charged the jury:

"That if the plaintiff was under a regular monthly salary from Folsom during the time the services, now claimed for, were performed, then it was a presumption of law, that all the services

he performed during said period, whether ordinary or extraordinary, were paid for by said salary, and to overcome this presumption, plaintiff must show an express agreement for extra pay, otherwise he cannot recover."

Under this charge, there was no possibility of the jury's finding a verdict for the plaintiff.

The charge substantially was, unless an express agreement for extra pay is proved, plaintiff cannot recover.

This was clearly erroneous; an implied agreement might readily have been inferred from the evidence, and to offer testimony from which such implied agreement might be deduced, constituted the main scope of plaintiff's case; but the jury were not allowed, by the charge, to imply anything. They were told that no agreement but an express one would avail plaintiff.

This charge entirely cut off from the consideration of the jury the whole of plaintiff's evidence, for he did not pretend to recover for his extra services by proof of an express contract, but solely and entirely by virtue of an implied agreement, to be inferred from the testimony he adduced.

The Court might just as properly have charged: The plaintiff cannot recover at all, for he has made out no case.

It was not necessary for plaintiff (appellant) to establish an express agreement.

The true question for the jury should have been, whether, taking all the evidence together, plaintiff had made out that he was to be paid for his services. 2 Saunders' Pleading and Evidence, Part II, 1292.

Even when there is an express written contract, if extra services are performed, or extra work done, it is frequently implied from circumstances. This state of facts often occurs in reference to building contracts, but this principle of implication (so to speak) is applicable to all contracts. For the general doctrine, vide 2 Saund. Pleadings and Evi., Part II, 1293; 1 Parson's Contracts, 371, 372; also, 1 Parson's Contracts, 541, 542, and notes; De Boom v. Price & Co., 1 Cal. Rep., 206.

In a recent treatise upon the law of master and servant, it is said: "Unless the circumstances under which services of any sort have been rendered by one person to another, are such as to afford evidence of a contract, either express or implied, on the part of the person said to pay for them, there is no duty binding him to do so," etc. Smith's Master and Servant, 100.

"A and his wife boarded and lodged in the house of B, the brother of A, and both A and his wife assisted B in carrying on his business. A brought an action for the services, to which B pleaded a set-off for board and lodging: *Held*, neither the services, on the one hand, nor the board and lodging, on the other, can be charged for, unless the jury are satisfied that there was

a contract, express or implied." *Davies v. Davies*, 9 Car. & Payne, 87, to be found in 38 English Com. Law, 46, 47.

The precise case in question is put by Mr. Smith, in his aforesaid treatise on the law of master and servant. He says:

"Upon similar principles it is equally clear, "that where a stipulated remuneration has been agreed upon, the servant has no claim to additional remuneration on the mere ground of his performance of additional services; unless he can prove some contract, either express or implied, on the part of his master, to pay him an increased salary for his additional services, he can recover no remuneration for them." *Smith's Master and Servant*, 101.

"In fact, it may be said to be a question for a jury in all cases where services have been rendered without any express contract to pay for them, whether or not there was an implied contract to do so." *Smith's Master and Servant*, 101, 102.

In one class of cases some authorities hold, that an implied contract will not be inferred, and that the plaintiff can only recover on proof of an express contract. I refer to cases of service arising between relatives.

These cases are *sui generis*, and the principles by which they are governed cannot be successfully invoked in or appropriately applied to a case like the present.

Even in a case between relatives, this Court has held that the plaintiff may recover upon an implied contract. I refer to *Murdoch v. Murdoch*, 7 Cal., 511.

The error committed by the Judge of the Superior Court in his charge, appears so manifest, and the principle upon which plaintiff (appellant) relies, so elementary, that I will not multiply authorities upon the point, or trouble this Court with its further discussion, believing with Judge Story: "That in the very attempt to make more clear what is unambiguous, there is danger of creating an artificial obscurity."

#### *Gregory Yale* for Respondents.

1. The direction of the Court to the jury, that they must find an express contract between the plaintiff and testator for agreeing to pay for the services set up in the complaint, in case the plaintiff was proved to have been a regular salaried servant of the testator, and which is assigned as error, was not given on the prayer of the defendants, but by the Court, in reference to all the facts in proof by plaintiff and defendants. 2 *Saund. Pleadings & Ev.*, Part II, 1292.

2. The charge was correct, as a general principle, but especially as applicable to the facts of this case, in reference to which it was given. *Lambrun v. Creeden*, 40 E. C. L., 358-9; *Britton v. Turner*, 6 N. H., 491, recognized as sound law by Perkins in his *Ed. of Chitty on Con.*, 580; 2 *Story Con.*, § 962; *Peakes Nisi*

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Prius Cases, 45, 72; Murdoch v. Murdoch, 7 Cal., 511; Nicholson v. Patchen, 5 Cal., 474.

A misdirection of the Judge is not sufficient to set aside a verdict and grant a new trial, if it appears to the Appellate Court, in looking at the whole case, that the losing party should not recover, and that the verdict is just. Greenut v. Stocker, 3 Gillman Ill., 202, commencing at last paragraph on page 214, to end of 216; Welch v. Sullivan, 8 Cal. R., 165.

The nature of the plaintiff's services shows that there could be no contract made respecting it. The policy of the law could not permit a man to engage another to "expel" a squatter from a lot of land. Such a contract necessarily implies the use of force, a breach of the peace follows as inevitable. Land titles can not be settled by a self-constituted tribunal using an armed force to eject the occupant. The occupant is *prima facie* the owner—so held in law until legally ousted. But it is said that the Courts would not oust a squatter on Folsom's title. Then we reply that Folsom had no title. No man has a title to lands which the Courts refuse to recognize. If the Courts refuse to recognize it he has no title. To claim title by force, aside from what the Courts recognize, would be to subvert the foundation of government.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover compensation for alleged *extra* services rendered by plaintiff to J. L. Folsom, deceased, in his lifetime. The plaintiff was employed and paid by the deceased a stipulated salary per month for services as collector of rents. The defendant had judgment in the Court below, and the plaintiff appealed.

On the trial the Court instructed the jury as follows:

"That if the plaintiff was under a regular monthly salary from Folsom, during the time the services now claimed for were performed, that it was a presumption of law that all the services he performed during said period, whether ordinary or extraordinary, were paid for by said salary, and to overcome this presumption plaintiff must show an express agreement for extra pay, otherwise he can not recover."

The learned counsel for plaintiff insists that this instruction was erroneous in requiring proof of an *express* agreement, when proof of an *implied* agreement would have been sufficient.

In support of his objection we are referred to Smith's Master and Servant, pages 101-2.

"Upon similar principles it is equally clear," says the author, "that where a stipulated remuneration has been agreed upon, the servant has no claim to *additional* remuneration, on the mere ground of his performance of additional services; unless he can

prove some contract, either express or implied, on the part of his master to pay him an increased salary for his additional services, he can recover no remuneration for them."

In support of the text, the author refers to the case of Bell and Drummond, (Peake, 45.) In that case it was "proved that the plaintiff having demanded an additional stipend, the testator had desired the witness (as a friend of both parties) to consider what ought to be allowed the plaintiff. That accordingly the witness did proceed to make an estimate, but before he had finally made up his mind the testator died."

In that case Lord Kenyon placed his decision upon the express ground that "it appeared clearly that the testator himself thought that he ought to pay something, and the only matter in controversy between him and the plaintiff was the *quantum* of the additional allowance."

Here the parties had conferred together as to the right of the servant to extra wages, which right was expressly admitted by the master, and the matter as to the *quantum* alone referred to a mutual friend. But in the present case there is no proof that the testator ever admitted that he was bound to pay an additional sum to plaintiff for these extra services. He said, upon several occasions, that they were very important and valuable, and that he felt very grateful for them. But he never spoke of *paying* for them as *extra* services, or *admitted* that he was liable to pay anything.

Most of these extra services were of such a character that a Court of Justice would not enforce a contract for compensation. And as to the other portion of these alleged extra services, they were of a nature so nearly similar to the regular duties of the plaintiff, that an express contract to pay for them should have been proved, to enable the plaintiff to recover.

The language of the instruction may have been too broad, if found in a legal treatise upon the general subject of extra services; but, as applied to the peculiar circumstances of the case before the jury, the instruction was right. The facts proved did not entitle the plaintiff to recover, and substantial justice seems to have been done. The plaintiff was slow in urging his claim upon the testator in his lifetime, and we cannot disturb the verdict of the jury.

Judgment affirmed.

**MITCHELL v. STONER, TREASURER OF PLACER CO.**

The special act of the Legislature, approved April 4, 1857, fixing the compensation of the county clerk of the county of Placer at \$3,000, was intended in lieu of all fees for services rendered the county.

**APPEAL** from the District Court of the Eleventh Judicial District, County of Placer.

This was an agreed case. By the agreed statement of facts it appears that plaintiff, Tabb Mitchell, was county clerk of Placer county, and that by virtue thereof, he was *ex officio* clerk of the board of equalization, auditor and recorder of said county, and as such, is entitled to the compensation and profits of said office since the second day of June, 1857.

The assessor of said county sold three hundred and eighty poll-tax receipts in the month of September, 1857, amounting to the sum of \$1,520. That \$684 of said amount goes into the State treasury, and that plaintiff's per centage on that amount has been paid to him, but not upon the proportion of said funds going to the county. During the same month the sheriff of said county sold one hundred foreign miners' licenses, at \$4 each—\$400, which was, after deducting the fees of sheriff, paid to said treasurer. Plaintiff, as such clerk, claims \$25 08, his per centage on said sums of money going into the county treasury, and also the sum of \$12, due him as recorder, and has demanded the same from the defendant, as treasurer of said county, and that the treasurer has refused to pay said several sums of money on the ground that the act of the fourth of April, 1857, fixed the compensation of said county clerk at \$3,000 for all services rendered the county.

Upon this state of facts, plaintiff applied to the Court below for a *mandamus* to compel the defendant to pay said sums of money. The Court refused to order the writ, and gave judgment for the defendant, from which plaintiff appealed to this Court.

*James Anderson* for Appellant.

*Thomas & Hawkins* for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

*Mandamus* to compel the defendant, as treasurer of Placer county, to pay the plaintiff, as clerk of said county, certain per centage upon the amount of poll and foreign miners' tax col-

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 Mitchell v. Reed.
 

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lected in said county. The writ was dismissed by the District Court, and the plaintiff appealed.

The special act of the Legislature, approved April 4th, 1857, fixed the compensation of clerk at \$3,000. We think this was intended in lieu of all fees for any and all services rendered for the county. The case comes within the spirit and intent of the act.

We think the judgment of the District Court should be affirmed.

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### MITCHELL v. REED.

Where A, the owner of property, represents that certain property in his possession belongs to B, and that representation coming to the ears of C, a creditor of B, who sues out an attachment against B, and seizes the property: *Held*, that A is estopped from setting up a claim to the property.

Where the express declaration to a third party is not confidential, but general, and this is afterwards acted on by others, the party making the declaration is estopped.

The intention with which the declaration is made is not material, except, perhaps, when the communication is confidential. It is the fact that the declaration has been acted upon by others, that constitutes the liability to them. Nor does it make any difference whether the thing admitted was true or false.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

The facts appear in the opinion of the Court.

*H. O. Beatty* for Appellant.

On the trial, the Court below instructed the jury, in effect, "that the representation of Mitchell justified McGrew in levying the attachment. That, for the time being, Mitchell was estopped." But the Court qualified this instruction by saying "unless Mitchell, or his agent, notified either McGrew or the officer, at the time of levy, under the attachment, and before the sale, under execution, that the property was his, in that case he would not be estopped, but would be entitled to recover the full value of the liquors."

The first part of this instruction is right. The only question in this case is, whether the qualification above quoted is not erroneous. We contend that it is. *Hester v. Hays*, 3 Cal. Rep., 302.

*Cross & Marshall* for Respondent.

In the case of the Welland Canal Company v. Hathaway, 8 Wend., 433, the Court lays down the doctrine of estoppel *in pais*. That a party, as a general rule, will be concluded from denying

his acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and where such denial will operate to the injury of the latter.

A similar doctrine is found in the case of *Truscott v. Davis*, 4 Barb. Sup. Ct. R., 498. See note A, 3 Johns. Cases, 103.

Estoppels are said to be odious, and not founded in law. *Jackson v. Brinkerhoff*, 3 Johns. Cases, 102.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The plaintiff was a merchant, engaged in the sale of groceries and liquors. The business at the store was generally conducted by his clerk, D. H. Haskell. On the trial, it was proven by two witnesses that plaintiff was a Son of Temperance, and that he repeatedly denied that he dealt in liquors, alleging that the liquors in the store were the property of Haskell, who sold them without plaintiff's consent. These declarations of plaintiff coming to the ears of Wm. H. McGrew, a creditor of Haskell's, he sued out an attachment, and had the liquors attached and sold as the property of Haskell. When the defendant, Reed, a constable, levied the attachment upon the liquors, he was notified by Haskell, as the agent of Mitchell, that they were in fact Mitchell's property. This suit was brought to recover the value of the goods sold. The plaintiff had judgment in the Court below, and the defendant appealed.

The Court below instructed the jury, that if McGrew, by the representations of Mitchell concerning the liquors, was induced to levy the attachment upon them as the property of Haskell, then Mitchell would be estopped to claim them as his own, unless he, by himself or agent, notified the officer that the liquors were the property of plaintiff; in which case, he would not be estopped.

It is insisted by the learned counsel of defendant that the latter portion of the instrument was erroneous. Conceding that McGrew was induced by the representations of Mitchell to bring his suit and levy his attachment upon the liquors as the property of Haskell, was Mitchell estopped to claim the property as his own?

Professor Greenleaf, in his accurate work on Evidence, divides estoppels into two kinds, solemn and unsolemn admissions. The latter are those "which have been acted upon, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied, without a breach of good faith." (Section 27.) The rule is laid down by the author in section two hundred and seven, in this language:

"Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making

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them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open and general conduct of the party. For, in the latter case, the implied declaration may be considered as addressed to every one in particular, who may have occasion to act upon it."

If the "*implied declaration* may be considered as addressed to every one, in particular, who may have occasion to act upon it," we can see no reason why an *express* declaration to a third party may not be considered as equally addressed to others who afterwards act upon it. If the express declaration be confided to the third party as a confidential communication, then it might admit of some doubt. But where the express declaration to the third party is not confidential, but general, and this is afterwards acted upon by others, the party making the declaration should be estopped.

The particular *intention* with which the declaration, express or implied, was made, is not material, except, perhaps, when the communication is confidential. It is the fact that the declaration has been acted upon by others, that constitutes the liability to them. "It makes *no difference* in the operation of the rule, whether the thing admitted was *true* or *false*—it being the fact that it has been acted upon that renders it conclusive." "If it is a case of innocent mistake, still if it has been acted upon by another, it is conclusive in his favor." 1 Greenl. Ev., § 208, and note 4.

If McGrew was induced to bring his suit, and levy his attachment, in consequence of the declarations of Mitchell, then McGrew acted upon those declarations. And, after he incurred the expense of a suit he otherwise would not have brought, it was too late for Mitchell to object, unless Haskell had other property, known and accessible to McGrew, upon which he could have levied his writ. If McGrew had given credit to Haskell upon the faith of Mitchell's declarations, then it would be perfectly clear from reason and authority that the estoppel would be complete. The same principle applies to this case. There can be no difference, except as to the amount, in the two cases. The law will not look upon that question. The expense to which McGrew was put by the declaration of Mitchell may have been much less than the amount of his debt against Haskell; but still he was induced to incur this expense in consequence of Mitchell's declaration. If Mitchell is not holden, then McGrew must lose his costs and expenses.

The case of the First Presbyterian Congregation of Salem v. Williams, cited by Nelson, J., in Welland Canal Company v. Hathaway, 8 Wend., 483, is a case in point. There the plaintiffs were induced to bring an ejectment-suit by the false statement

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of the defendant, and the latter was held to be estopped to set up an otherwise good defence against the action.

If parties choose to make untrue statements, by which others are injured, they should be estopped to unsay what they have before said. Estoppels, in general, are odious; but in mercantile and ordinary business transactions, where men must trust to appearances and the declarations of parties, because they have no *other* means of information in such cases, the Courts have been inclined to extend the list of estoppels. 2 Smith's Lead. C., 511, note.

Judgment reversed, and cause remanded.

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### DICKINSON v. VAN HORN.

Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the Judge.

In a statement for a new trial the evidence may be simply referred to, and need not be set out in the statement itself.

It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out.

Where the evidence is not set out in a statement on appeal, this Court will presume that the Court below had good reason for granting a new trial.

The County Court has a right to grant a new trial.

#### APPEAL from the County Court of Trinity County.

The facts necessary to understand the points decided, appear in the opinion of the Court.

#### *Sprague & McMurty* for Appellant.

The appellant says the Court erred in granting a new trial.

1. Because the statement, upon which the new trial was granted, contained a portion of the evidence of the case, and was not agreed to by the adverse party, or settled by the Judge. Wood's Digest, p. 192, § 195; *Lynn v. Twist*, Eddy & Co., 3 Cal. R., 89, 90; *Harley v. Young*, 4 Cal. R., 284.

2. No statement for a new trial having been settled by the Judge, or agreed to by the parties, it is no part of the record, and it must be presumed by the Supreme Court that the motion for a new trial was abandoned by the respondent. *Vermeule v. Shaw*, 4 Cal. R., 214.

3. Because the statement upon which the new trial was granted was not sufficient, in this: that it assumes to contain evidence in the case sufficient to sustain the ground taken, and

no more, and does not contain such necessary evidence. Wood's Digest, p. 192; *Hill v. White*, 2 Cal. R., 306, 307.

4. The entire record, in this case, discloses no error by which the rights of the respondent were injuriously affected, and, such being the fact, this Court will examine the record no further than is necessary, in order to determine whether the Court below did or did not err in granting a new trial.

Additional points for Appellant, by *Heydenfeldt*.

1. The statute which gives power to the County Judge to hear a contested election makes a special case, and the Judge has no power over it, except what he specially derives from the statute.

But the statute gives him no power to grant a new trial, and in a special proceeding, unknown to the common law, he can take nothing by implication.

2. But if a new trial is of right within the power of the Court, then the County Judge erred in granting it in this case, because the statute-provision, which gives the right, was in no manner complied with. There was neither affidavit nor statement. See § 194, Prac. Act.

*Garter & Burch* for Respondent.

Respondent says that appellant has not shown error in the order of the Court below, granting a new trial, but that the judgment entered in favor of the appellant was properly set aside, and this Court should affirm said order.

It was not necessary that the motion for a new trial should contain a copy of evidence on file; it was sufficient for the motion to refer to the evidence as of record, without copying it. See Wood's Digest, p. 192, Art. 930, § 195.

The fact of a bill of exceptions, or statement on appeal, not accompanying the record, is not the fault of the respondent, and cannot enure to his injury, as insisted upon by appellant. See Wood's Digest, p. 210, Arts. 1072, 1073, § 338, 339; *Wilson v. Middleton*, 2 Cal. R., 54; *Lynn v. Twist, Eddy & Co.*, 3 Cal. R., 89, 90.

This Court will not disturb the order of an inferior Court granting a new trial, when there is no bill of exceptions, or statement on file, showing in what regard the Court below erred; but will presume that the Court below decided properly in granting a new trial, upon an examination of the whole case. See *Gates v. Buckingham*, 4 Cal. R., 286; *Leech v. Allen*, 2 Cal. R., 95; *Speck v. Hoyt*, 3 Cal. R., 413; *Palmer, Cook & Co. v. Stewart*, 2 Cal. R., 384; *Taylor v. McKinley*, 4 Cal. R., 104.

This Court will not presume error, but error must be affirmatively shown, and all intendments are in favor of the Court below. See *Harley v. Young*, 4 Cal., 284; *Ford v. Holton*, 5 Cal. R., 319; *Johnson v. Sepulbeda*, 5 Cal. R., 149.

The record sent up discloses the fact, that the appellant was present in the Court below, by counsel, when the order granting a new trial was made, and his exception to said order noted. No bill of exceptions, or statement, appears to have been settled, signed, and sent up, showing the error of the Court in granting a new trial; in such case this Court will only examine the judgment-roll and record sent up, showing the proceedings of the Court below, in regard to which there are no assignments of error filed, on the part of the appellant. See *Harley v. Young*, 4 Cal. R., 284.

If the additional points of appellant, made by Judge Heydenfeldt, subsequent to the filing of appellant's original points and authorities, are considered by the Court, respondent answers thereto as follows :

1. In special cases, over which County Courts have jurisdiction for the purpose of trial, these Courts necessarily exercise all jurisdiction which goes to the rendition and vacating of their judgments.

But has the County Court jurisdiction of the subject-matter of this action? This point is raised by the respondent in his objection to the ruling of the County Court, assuming jurisdiction of this case. See *Parsons v. The Tuolumne Water Co.*, 5 Cal. R., 43; and *Brock and Pritchford v. Bruce Herrick and others*, 5 Cal. R., 279.

It is held that County Courts have jurisdiction of special cases, and that by special, is meant such cases as are entirely statutory, and were not known to the frame-work of the common law.

This proceeding in the County Court in contested election cases, is in the nature of a *quo warranto*, which was certainly as much provided for, at common law, as the enforcement of a mechanic's lien.

*Quære*.—When was the contest of an election, or of the right to exercise the duties and powers of an officer, not known to the common law?

If, then, there is anything in the points of appellant filed by Judge Heydenfeldt, will his objections not extend to the original jurisdiction of the Court? and do not the above-cited authorities show a want of jurisdiction?

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was a proceeding before the County Court, in which the election of defendant, as clerk of Shasta county, was contested by the plaintiff. According to the certified returns from the several election precincts, the defendant received one thousand and seventy-eight, and the plaintiff one thousand and seventy-seven votes, and thereupon the certificate of election was granted

to the defendant. Upon the trial, the Court rejected fourteen votes, as illegal, from the votes counted for the defendant, and twelve from those counted for the plaintiff, leaving the plaintiff a majority of one. The defendant then moved for a new trial, which was granted, and from this order, the plaintiff appealed.

The first point raised by the appellant is, that the statement for a new trial was not agreed to by plaintiff, and not settled by the Judge.

It is clearly stated in the record, that on the trial, the parties read in evidence certain depositions and other papers on file, and that a certain witness, whose name is given, was examined by the defendant. The depositions and papers read by each party are properly described in the record. The statement for a new trial contains the grounds upon which the defendant intended to rely; also, the evidence of the only witness examined orally in Court, and a statement that the defendant would refer to the evidence on file, and the pleadings in the case. A copy of this statement was duly served upon the counsel of plaintiff, as appears from their written acknowledgment at the foot of the statement. Both parties appeared at the argument upon the motion for a new trial; and in the order granting the same, and which is signed by the Judge, it is recited that the defendant "moved the Court to grant a new trial for cause set forth in the statement herein filed."

The learned counsel for plaintiff have referred us to the cases of *Linn v. Twist* and others, 3 Cal. Rep., 89, and *Harley v. Young*, 4 Cal. Rep., 284.

But these cases would not seem to be in point, as it does not appear that the statement was anywhere referred to in any part of the record signed by the Judge. These decisions were made before the three hundred and thirty-ninth section of the Code was amended in 1855. We are not disposed, therefore, to extend the principle of the case of *Linn v. Twist* to any case not strictly parallel in its substantial circumstances. It is true, that the provisions of the three hundred and thirty-ninth section apply only to statements on appeal. But they contain principles that, in some measure, by parity of reasoning, would apply to statements for new trials.

In this case, the record shows clearly, that the only evidence given was on file when the statement was made, except the testimony of a single witness, and that purports to be given in the statement itself. This case comes within the principle laid down in the late case of *Williams et al. v. Gregory et al.*, January Term, 1858.

If we are correct in these views, the statement of defendant for a new trial was sufficient.

It is objected on the part of defendant, that there is no statement on appeal, and this Court must presume the Court below

had ample reason for making the order granting a defendant a new trial.

In a statement for a new trial, the evidence may be simply *referred* to, and need not be contained in the statement itself. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. If the statement on appeal does not contain the evidence, or so much at least as may be necessary, then the appellant cannot rely upon any ground depending upon the testimony.

In this case, one of the grounds relied upon for a new trial was the insufficiency of the evidence to support the finding of facts by the Court. As the testimony is not before us, we must presume the Court below had good reason for granting a new trial. If the plaintiff wished to overcome this presumption, he should have filed his statement on appeal, which should have *contained all* the testimony given on the trial.

It is urged by the counsel of plaintiff that this was a special case in which the statute gives the Court below no right to grant a new trial. But we think the objection not well taken. The appellate power of this Court over the County Courts in such cases could not be properly and efficiently exerted, unless the power to grant a new trial existed in the Court below. If that Court could not grant a new trial, its refusal to do so would not be error. And as this Court can only direct the lower Court to do that which it has improperly refused to do, there could, under such a theory, be no new trial at all, under any circumstances, however grievous the error might be. We think, under the provisions of the sixty-third section, that such a power can be exercised by the County Court. (Wood's Digest, 382, Art. 2,163.)

These points dispose of the case, and it is unnecessary to notice the others made by both parties.

Judgment affirmed.

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### MUSGROVE *et al.* v. PERKINS.

The granting or refusing a continuance rests in the sound discretion of the Court. A mistaken advice of counsel to his client, not to prepare for trial, is no ground for a continuance.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

The facts appear in the opinion of the Court.

*J. A. McDougall* for Appellants.

*Sprague & McMurty* for Respondent.

FIELD J., delivered the opinion of the Court—TERRY, C. J., concurring.

When this cause was called for trial, the counsel of the plaintiffs moved for a continuance, upon his affidavit that he had advised his clients not to prepare for the trial until an appeal from an order dissolving the injunction in the cause had been heard and determined by the Supreme Court; that, acting upon such advice, the necessary preparations had not been made, and could not then be made, in consequence of the absence of a material witness, whose presence or deposition would have been otherwise obtained. The Court denied a continuance, and the plaintiffs refusing to proceed with the trial, the cause was dismissed.

The granting or refusing a continuance rests in the sound discretion of the Court below; and its ruling will not be revised, except for the most cogent reasons. The Court below is apprised of all the circumstances of the case, and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an Appellate Court, and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed.

The mistaken advice of counsel to his clients, not to prepare for the trial, was no ground for a continuance. It was based upon an erroneous impression that the appeal from the order dissolving the injunction operated as a stay of proceedings in the cause.

Mistakes in matters of law are frequently made by counsel, and if parties could be relieved by simple allegations of having acted, or neglected to act, in consequence of advice predicated upon such mistakes, there would be no end of the cases in which such excuses would be offered.

Judgment affirmed.

## PEABODY v. PHELPS.

The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend on the character of the reference; whether it be special, to report the facts, or general, to report upon the whole issue.

In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the Court, and judgment may be entered thereon, exceptions taken and reviewed, as if the action had been tried by the Court.

Upon facts found, whether by report of the referee, or special verdict of a jury, the direct action of the Court must be invoked before judgment can be entered. Hence, the time within which the notice of motion to set aside the report or verdict must be given, should date from the filing of the report, or the rendition of the verdict.

But where an action is tried by the Court without a jury, or the whole case is referred to a referee, judgment follows immediately as a conclusion of law upon the facts found, and the time within which the notice of the motion should be made, dates from the entry of the judgment.

A party is not bound by a judgment rendered in an action of ejectment where he has not received legal notice of the action. Such judgment is not evidence against him of paramount title in the plaintiff in ejectment. Mere cognizance of the existence of the action is not legal notice. To be available, the notice must apprise the party, whose rights are to be affected, of what is required of him, and the consequences which may follow if he neglects to defend the action.

An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants.

All previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined.

If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them.

**APPEAL** from the District Court of the Seventh Judicial District, County of Solano.

This was an action brought to recover the sum of \$4,500, with interest, the purchase-money for a lot of ground in the city of Benicia, on the ground of false and fraudulent representation as to the fact of title in the vendor at the time of sale. The facts are as follows:

In October, 1849, the defendant sold and conveyed to the plaintiff the lot of land for \$4,500. Before, and at the time of the sale, the defendant represented to the plaintiff that he had the lot, or was the owner of the lot, and had purchased it from Thomas O. Larkin. The deed of conveyance from defendant to plaintiff, after reciting the consideration-money, etc., is as follows: "Have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said William F. Peabody, his heirs and assigns, for ever, all my right title and interest and estate in and to a certain tract or parcel of land." \* \* \* \* "Which said tract or parcel of land was derived to me, the said Bethuel Phelps, from

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Thomas O. Larkin, of Monterey, by deed bearing date — day of —, A. D., one thousand eight hundred and forty-nine, reference being had to said deed now on record in the office of the alcalde of said Benicia. To have and to hold the above granted and bargained premises, with all the privileges and appurtenances thereof, to the said William F. Peabody, his heirs and assigns, to his and their own use and behoof for ever, and I, the said Phelps, do, by these presents, covenant to warrant and defend the said William F. Peabody, his heirs and assigns, in the title to said premises, from me and my heirs and assigns, for ever."

Under this deed, plaintiff entered into possession of the premises and made valuable improvements thereon. In January, 1851, plaintiff conveyed the premises to Henry G. Wetmore, who in October following conveyed the same to John T. Peabody. In February, 1853, Thomas O. Larkin sued the Peabodys in ejectment for the premises, and in May following recovered judgment in such action for the possession. In January, 1855, execution was issued, under which proceedings were taken, which, it was insisted, amounted to an eviction. In the Larkin suit the defendant was not made a party, nor had he any notice of it, other than the knowledge that such an action was pending. This cause came on for trial, and, by agreement of counsel, was referred to E. W. F. Sloan to find the facts and report a judgment thereon. On the eighth day of March, 1856, the referee reported a judgment for plaintiff for the amount claimed, and judgment was entered on that day, which was in vacation. The defendant appealed from the judgment; and, at the January Term of this Court, 1857, the judgment was reversed, on the ground that it was rendered in vacation. At the following March Term of the District Court of the Seventh Judicial District, in and for Solano county, on motion of plaintiff's counsel, and on filing the *remittitur* in this case from the Supreme Court, the report of the referee was confirmed, and, on March 28, 1857, judgment was entered for plaintiff. Defendant's counsel then obtained from the Court below an order directing the referee to certify the evidence taken before him, and gave notice of motion to set aside the report. The evidence being returned by the referee, a statement was prepared, and the motion made, which being denied, the defendant appealed.

*John Currey* for Appellant.

As preliminary to the argument of the case, it is deemed proper to notice certain objections suggested on the part of respondent, as technical impediments to the consideration and decision of this case upon its merits.

The position of respondent, to the effect that there is no means or mode by which the decision and report of a referee may be

reviewed after his report is filed, and especially after the Court has entered judgment thereon, is fraught with consequences repugnant to every sense of justice; and it would seem unnecessary to do more than state the proposition and invite attention to its consequences, in order to obtain from this Court its prompt judgment that such is not the law.

This position the appellant insists has no resting-place, either in principle or authority.

In principle, such position is fallacious, because by its adoption as a rule, the appellant would be without remedy, however just might be his cause of complaint.

To say that a party must file his notice of motion to set aside a decision, within two days after the trial in fact, which in many cases is before the decision is published, is preposterous; and an attempt to prove by argument that the rule is otherwise, would be as idle as an effort to establish the truth of an axiom; and to hold that the appellant should have filed his notice of motion to vacate the judgment and the decision whereon it was alleged to be based, before the judgment was rendered on the twenty-eighth of March, 1857, would be requiring the appellant to presume, at his peril, that the judgment would be adverse to him, and that the Court would confirm the report of the referee as to his conclusions of law, though entirely unwarranted by the facts found.

Upon authority, the respondent's position here noticed is equally untenable.

In *Sloan v. Smith*, 3 Cal., 407, the Court say: "On filing the report, judgment is entered as a matter of course, and the only mode in which a party can take advantage of it is by moving to set aside the judgment, as on a motion for a new trial."

In *Headley v. Read*, 2 Cal., 325-6, the Court say: "Upon the report of a referee under the statute, if it contain sufficient on which to base a judgment, it is the duty of the Court below to enter judgment in accordance with the report, as far as it concerns the matters referred, and it has no right to entertain any objections whatever. After the rendition of the judgment, the Court may award a new trial, and set aside the report," etc.

In *Lurvey v. Wells*, 4 Cal. R., 106, the Court, in referring to *Baldwin v. Kramer*, 2 Cal. R., 582, say: "The facts of the case showed that no notice or motion for a new trial had been filed until several months after the close of the term at which the judgment was rendered."

From these authorities, it would seem the notice of motion to set aside the report and judgment, and for a new trial, can not properly be filed until after judgment on the referee's report; and that, after the rendition of the judgment, the Court may award a new trial and set aside the report; and it further appears, inferentially, from the case of *Headley v. Read*, that no

judgment can properly be entered on the report of a referee, unless it contain sufficient on which to base a judgment.

The second objection, insisted on by respondent, is that by the lapse of time from the placing of the referee's report on file, (March 8, 1856,) until the entry of judgment thereon by the Court (March 28, 1857,) the appellant lost his right to move to set aside the report and the judgment thereon rendered, and also all right to a statement of the evidence and objections and exceptions taken before the referee.

This objection is obviated by the authorities before cited, and also by the fact that until judgment was rendered on the report, by the Court, the appellant could not move in the matter. The circumstance that appellant did attempt, prematurely, to have the judgment entered by the clerk of the Court in vacation (March 8, 1856,) as upon a motion for a new trial vacated, cannot affect the appellant's right to move upon the rendition of judgment upon such report, by a Court of presumed authority.

The clerk's judgment was a nullity, and, as such, was reversed by this Court; but the judgment of the District Court, of March 28th, 1857, has the force and effect of a valid judgment, until reversed or otherwise vacated. The question here presented is: Did the law, upon the rendition of such last-named judgment, afford to the appellant the right to move to set aside such judgment? And did the same law secure to him the right to an exhibit, by a statement of the truth, and the whole truth, of the matter and process through which he was condemned?

The respondent's third objection is to the effect that after the referee's report was filed, his powers in the premises ceased—that as referee he was no longer under the authority of the Court by virtue of whose appointment he made such report.

This position, the appellant insists, is without reason for its basis, and is contrary to the practice of the Courts in such cases. The referee remains such until the case is finally determined: and if the cause be reversed and remanded for a new trial, he must try it again, unless discharged by the Court, of his office as referee. This was so held in *Shuart v. Taylor*, 7 How. Pr. R., 251. To the same effect is *Goodrich v. Marysville*, 5 Cal., 530. These authorities establish that the referee remains subject to the authority of the Court until the cause is determined.

The last objection of respondent which will be noticed here, is that the case at bar has been fully adjudicated, and should be regarded as a matter *res adjudicata*.

If this be so, by the order of the Court below, made June 26, 1856, then the judgment rendered March 28, 1857, was *coram non judice*, and should be reversed; for such order affirming the judgment before then rendered on the report of the referee, together with the judgment so affirmed, was by this Court reversed.

On the part of the appellant it is deemed unnecessary to say more in respect to respondent's objections above noticed.

There was but one covenant in the deed of October 29, 1849, which was, to warrant and defend the grantee, his heirs and assigns, in the title to the premises, from the grantor, his heirs and assigns, for ever. This is a limited covenant expressed. *Sanders v. Betts*, 7 Wend., 287. In such cases the rule is as expressed in *Frost v. Raymond*, 2 Caine's R., 192, "that an express covenant will do away with all implied ones." The affirmative covenant is negative of what is not affirmed. *Expressum facit cessare tacitum*, enunciates one of the first principles applicable to the construction of deeds. *Apsdin v. Austin*, 5 Adol. and El. N. S., 682; *Dunn v. Sayles*, Ib., 691.

In the creation or transfer of an estate of freehold, no covenant for title is implied at the present day by the common law, except perhaps where the word give may happen to be employed, and it may be doubted whether such an effect would be given even to this word. *Rawle on Cov. for Title*, 361; *Whitehill v. Gotwalt*, 3 Penn. R., 326; *Allen v. Sayward*, 5 Greenleaf R., 230; *Pickett v. Dickens*, 1 Murphy, 346; *Deakins v. Hollis*, 7 Gill. and John., 311.

By the deed of the defendant to the plaintiff, the grant was of all right, title, interest, and estate of the grantor, in the premises therein described. Where the grant is thus restricted, even though followed by unlimited covenants of seizin and warranty, such covenants can be taken in a limited sense only, and are to be restricted to the grantor's right, title, interest, and estate, whatever that may be. The covenants only attach to the right, title, and estate, conveyed. This was so held in *Sweet v. Brown*, 12 Met., 175; *Blanchard v. Brooks*, 12 Pick., 57; *Allen v. Holton*, 20 Pick., 463; *Wyman v. Harmon*, 5 Grattan, 162. See, also, *Rawle on Cov. for Tit.*, 396, and notes.

The plaintiff's complaint does not count on any breach of covenant, nor is it pretended that any covenant in the deed has been broken.

There being no complaint of the breach of any covenant, the alleged fraud is the gist of the plaintiff's action.

Had the defendant any right or interest in the premises described in the deed of October 29, 1849? If he had, the pretence of fraud and damage consequent thereon must fail the plaintiff's purpose.

On and before the date of the deed mentioned, the defendant was in possession of the premises. Under such conveyance the plaintiff entered into the possession of the premises, and has continued there since, without interruption. This being so, the defendant had a right, title, interest, and estate therein, which he could convey; and there is no evidence in the case that he

undertook to convey any greater interest in the property than he had therein.

Lands and tenements, held by no stronger tenure than possession, may be the subject of sale and transfer. *Johnson v. Rickett*, 5 Cal. R., 218; *Norton v. Jackson*, *Ib.*, 262; *Parker v. Crane*, 6 Wend., 647.

The plaintiff received of defendant the possession of the property. He purchased defendant's right, title, interest, and estate therein, and nothing more; and, as was said by Justice Bronson, in *Whitney v. Lewis*, 21 Wend., 133, "For aught that appears, he knew as much about the title as the defendant, and the one party may have been as willing to take the deed and trust to the covenant, as the other was to give it."

In the conveyance mentioned, reference was made to a deed from Larkin to defendant, as recorded in the office of the alcalde, at Benicia. This, on the part of the respondent, it has been assumed, is patent of a fraudulent intent of defendant; but it will be observed, that the subject-matter of the sale and purchase was there; and the means of ascertaining the truth respecting the matter recited, was immediately accessible to the plaintiff; and the lapse of time from May to the twenty-ninth of October, was ample for the examination of such record. Such matter, however, was not material; had it been, the investigation would have been made.

In 1 Sugden's *Vend. and Pur.*, p. 2, pl. 4, it is laid down that, "If the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet if they were patent and could have been discovered by a vigilant man, no relief will be granted against the vendor. \* \* *Vigilantibus non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser."

"Even a warranty will not cover defects which are the objects of the senses." 2 Kent, 484; 2 Caines, 202; 10 Vesey, 507.

"The common law affords every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." 2 Kent, 285.

On the part of the plaintiff, several cases were cited before the referee and in the Court below, to maintain that a purchaser of land may, in case of failure of title, recover against the vendor the consideration-price, upon an allegation of fraud.

The case of *Waddell v. Fosdick*, 13 John., 325, was an action on the case for a deceit in selling to the plaintiff, for a valuable consideration, land which had no existence. The Court held that the purchaser so defrauded, as appeared by the facts of the

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case, had a right to treat the deed as a nullity, and might maintain an action on the case for the deceit.

In *Monell and Weller v. Colden*, 13 John., 402, the defendant owned a lot of land in Newburgh, bounded on the east by Hudson River, and to induce the plaintiffs to purchase and give an enhanced price for it, falsely and fraudulently affirmed that there was appurtenant to the land a pre-emptive right, in the riparian owner, to a grant of land under the water of the river adjacent; and to which the plaintiffs would be entitled if they purchased the lot. The declaration averred these facts, and that giving faith to such affirmation, the plaintiffs were induced to purchase the lot, at a large price—that the land, without this privilege, would not be worth more than \$500, but that with the privilege, it would be worth \$30,000. To this declaration the defendant interposed a general demurrer. After a recapitulation of the facts averred, the Chief Justice said: "These facts being admitted by the demurrer, as true, I cannot see why they do not show a good cause of action. \* \* \* According to the declaration, the defendant knowingly and falsely misrepresented the fact with respect to the land under the water. \* \* \* The false representation was not in respect to any matter to be included in the deed, but with respect to a privilege, which the plaintiffs were to acquire in consequence of owning the land on the shore adjoining the river."

By these authorities it appears that the representations made were false and fraudulent; and that they were of matters collateral to the subject of sale. In *Whitney v. Allaire*, 1 Cow., 313, Bronson, J., said: "Actions have been sustained where the deceit was in relation to some collateral thing, as the rents or other profits derived from the land, things appurtenant to it, the incumbrances upon it, the location, quality, or condition of the land, what the vendor paid for it, and the like." The learned Judge then cites many authorities, and says: "Some of these cases are open to observation; but it is enough for the present to say that in none of them was the false representation on the naked fact of title." He then comments on several of the cases cited, and after stating that he did not find that an action for a fraudulent representation by the vendor of the title in himself, had ever been maintained, he says: "The learned Judge, who delivered the opinion of the Court in *Leonard v. Pitney*, (5 Wend., 30) evidently thought such an action would not lie; and the case of *Roswell v. Vaughn*, (Cro. Jac., 196) as understood by Lord Holt and Powell, J., in *Lysney and Selby*, (2 Ld. Raym., 1119) tends to the same conclusion. It is a strong argument against the action that no precedent for it has been found.

The judgment of *Larkin v. Peabody & Peabody*, and the proceedings had therein, was not competent evidence, in the action at bar, to determine, either that Larkin had a paramount title in

said premises, or that the appellant had no right, title, or interest therein.

If the appellant could have become concluded by the Larkin judgment, it must have been upon the hypothesis that he was privy to the action, and as such, though not a party to the record, had its defence as much under his control, as if he had been a party thereto. Upon this point, it is apprehended the same principle must govern, in an action like the case at bar, as does in actions brought by a grantee, after eviction by title paramount, against his grantor upon breach of covenant of seizin or warranty.

In analogy to the ancient practice of vouching to warranty, it is well settled in this country in most, if not all of the States, that, in general, upon suit being brought upon paramount title against one who is entitled to the benefit of a covenant of warranty, he can by giving proper notice of this action to the party bound by such covenant, and requiring him to defend it, relieve himself from the burden of being obliged afterwards to prove, in an action on the covenant, the validity of the title of the adverse claimant. Rawle on Cov. for Title, 198, 199.

In *Miner v. Clark*, 15 Wend., 425, the action was on a covenant of warranty of title in a deed of lands from which the plaintiff was evicted. On the trial this question arose. The plaintiff proved that when the ejectment-suit was commenced against him, by virtue of which he was evicted, he gave verbal notice of the suit to his grantor, and requested him to attend to the defence. The notice to the effect of the one given was agreed upon by the Court as necessary to bind the grantor, by the judgment in the ejectment-suit; but the court were divided upon the question whether or not such notice must be in writing.

Justice Bronson was of opinion that the notice should be in writing, as it was to have the effect of a legal proceeding, and that as was said in *Gilbert v. The Columbia Turnpike Co.*, 3 Johns. Cas., 107, "a notice in legal proceedings means a written notice." The learned Judge says: "If the notice is to have any influence upon the right of the party, it should be given in such form as fully to apprise the person receiving it of what is required of him, and the consequences which are to follow, if he neglects to take upon himself the defence of the suit." In the same case, Ch. J. Nelson said: "If notice of the suit had not been given to the defendant, it would have behooved the plaintiff to have shown that a full defence was made, and that the defendant, if notice had been given, could not have defeated a recovery."

It cannot be said that because the appellant was cognizant of the prosecution of the ejectment-suits of Larkin, that therefore he had, in the legal sense, notice thereof, because knowledge in such cases is not notice—the notice in such case being to advise the party to be charged with the consequences of the judgment

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that may be recovered, what has been done, and what he is required to do.

The appellant respectfully insists that he should not be held concluded by a judgment recovered in an action to which he was not a party, and against which he had not the power to defend. If he had no other right, title, or interest in the property than that of a naked possessor, such fact, if conceded, could not alter his right to contest the asserted claim of Larkin, who could only recover by virtue of superior title. If the appellant could have controlled the defence in the ejectment-suit, the result might, and probably would have been, to have defeated the claim of Larkin; and thus would have been secured to the defendants therein the quiet possession of the property—a possession that might have ripened into a perfect title. *Norton v. Jackson*, 5 Cal., 262; 2 Black. Com., 195-6; *Beddoe's Ex'r. v. Wadsworth*, 21 Wend., 124.

*Whitman & Wells for Respondent.*

The respondent's counsel submit that the only question before the Court is the propriety of the action of the Court below, in the entry of judgment on the report of the referee, March 28, 1857; that the reversal of the judgment originally entered, could not operate to re-open the case beyond the error indicated by such reversal; that the right of appellant to a statement of the evidence, etc., had previously been lost, and that such right was not dependent on the time of entry of judgment, but on the trial of the cause.

The several decisions of this Court have fully settled the analogy between trial by referees and by the Court or a jury. *Tyson v. Wells*, 2 Cal., 122; *Walton v. Minturn*, 1 Cal., 405; *Headley v. Reed*, 2 Cal., 322; *Sloan v. Smith*, 3 Cal., 406; *Phelps v. Peabody & Co.*, January Term, 1857.

The only period at which the defendant had a right to a statement was by giving his notice two days after the trial, and filing statement five days thereafter. Under the Practice Act of 1850, the party might apply for a new trial within five days after judgment, but this was changed in the act passed April 29, 1851, and the present rule adopted, which fixes the trial as the point when the right of a party to new trial accrues.

In the absence, then, of statute regulation or a rule of the Court, it might be doubted whether the party could date his time from the filing of the report. Were the question material, it might be insisted that his stipulation should control.

Assuming, then, that on the filing of the report, at farthest, the right of the party to proceed for a new trial first accrues, it follows that the lapse not only of time, but two terms of Court, would bar any action in relation to a statement.

It has been repeatedly held by this Court, that after the expiration of the term of the Court wherein judgment was rendered,

the Court loses all control over the cause, unless the same be saved by some proceeding taken at the term. *Baldwin v. Kramer*, 2 Cal., 583; *Survey v. Wells*, 4 Cal., 106; *Morrison, Adm'r. v. Dapman et al.*, 3 Cal., 255.

In *Baldwin v. Kramer*, the Court say: "We hold that after the expiration of a term of the District Court, no power remains in it to set aside a judgment, and grant a new trial; a different doctrine would lead to great uncertainty, and possibly to gross abuse. There must be a time when the rights of the parties are to be considered as determined, and for litigation to cease, and for this purpose the law has wisely fixed the rule here indicated."

So, in *J. Morrison, Administrator, v. Dapman*, cited above, the Court held that though the Court might make an entry conform to the judgment entered, it could not after lapse of a term, open on motion and render a new judgment, saying: "Such a practice is too loose, and would give rise to too much uncertainty."

So, in *Branger v. Driard and Chevalier*, decided at the present term of this Court, applying these principles to a statement, the Court say:

"While the term lasts, the Court has power to amend the record. After the term has passed, the record cannot be amended unless there is something in the record to amend by."

The question in the case last cited, was whether the Judge could set aside or revoke his certificate to a statement.

In this case, however, the powers of the referee are involved. On the return of his report to the Court his functions had ceased, his report became the record; admitting that the record might have been amended or completed by the addition of evidence, such amendment or addition could only have been made within the term succeeding the report. The evidence is no part of the report necessarily. *Sloan v. Smith*, 3 Cal., 406; *Headley v. Reed*, 2 Cal., 322.

The rule and policy that debars a Judge whose office and power continue, from disturbing proceedings after the lapse of a term, must apply with greater force to the case of a referee, whose office and functions determine on the rendition of his report. If required to send up evidence by a subsequent order, his duties under that order are merely clerical.

The defendant having heretofore appealed from the judgment of March 8, 1856, the decision of the Court on such appeal has become the law of the case. All prior questions merged in such appeal.

The motion for new trial, of which the grounds were filed March 15, 1856, was denied June 26, 1856. No appeal having been taken therefrom, such denial must be held conclusive.

The appeal, of which notice was given November 1, 1856, was from the judgment only.

In *Phelps v. Peabody et al.*, January Term, 1857, the action

of the Court below, and of the parties in reference to the statement and the motion for a new trial was before the Court and passed upon.

The matter has become *res adjudicata* by the denial of motion for new trial in the Court below, and by the final decision of this Court in *Phelps v. Peabody et al.*, 7 Cal., Jan. Term.

The judgment on appeal has become the law of the case. *Clary v. Hoagland*, 6 Cal., Oct. Term; *Simpson v. Garwood*, 7 Cal., July Term.

In *Clary v. Hoagland*, the case had been brought from the County Court of Yolo county, through the District Court, into the Supreme Court. After a decision, it had been decided that the District Court had no appellate jurisdiction, and the point was presented to this Court whether the former judgment was conclusive on the rights of the parties.

The Court say: "It is well settled, that when a case has been once taken to an Appellate Court, and its judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and can not, on the second appeal, be altered or changed."

So, in *Simpson v. Garwood*, 7 Cal., July Term, which was an application to modify the judgment of the Appellate Court so as to allow a new trial in the Court below, such order was refused, on the ground that the record disclosed no facts to warrant it.

The action of the Court below, in rendering judgment for the plaintiff on the report of the referee, March 28, 1857, was regular. The opinion of this Court on reversal having indicated the error, it was competent for the Court below to correct it. *Stearnes v. Aguirre et al.*, 7 Cal., April Term; *Holland v. City of San Francisco*, 7 Cal., July Term; *Phelan v. Supervisors of San Francisco*, 7 Cal., January Term.

In *Stearne v. Aguirre et al.*, the rule is thus laid down: "We are now called upon, for the first time, to determine whether a simple judgment of reversal is a bar to further proceedings in the same suit, and as the point has never before been adjudicated by this Court, and we have no rule of Court or of law which would control our judgment in the premises, we think it would be more just to follow the rule of the common law on this subject, by which the parties in this suit have in all probability been governed. At common law, the Appellate Court either affirms or reverses the judgment upon the record before it. The opinion which is rendered, is advisory to the inferior Court, and after the reversal of an erroneous judgment, the parties in the Court below have the same right that they originally had."

In *Holland v. San Francisco*, which was an application to modify the judgment of the Appellate Court, so as to admit of a new trial, the language of the Court is as follows:

"There having been no objection made by either party to the

finding of the facts, the same is conclusive upon both, and we have no power to order a new trial as to such finding. The only question which this Court could review, was the alleged error in the conclusion of law from the facts found, and the only effect of a reversal is to correct the error complained of. If this Court should send the case back to the Court below, the effect would be the same. 'That Court could not go beyond the error excepted to,' and could only correct its conclusion of law from the facts found. When this error should be corrected, the defendant would of course be entitled to judgment."

The appeal in this case was from the entry of judgment, and the decision of the Appellate Court indicated *Chichester v. Smith*, 1 Cal., 90, and *Coffinberg v. Horrell*, 5 Cal., as its authority for reversal. By reference to these cases, it will be seen that the real ground for reversal was the entry of a judgment on the report of a referee out of term. The motion for a new trial not being dependent on or any way connected with the entry of judgment, and not having been made the subject-matter of appeal, the reversal could not remit the defendant any rights in relation thereto.

It was therefore competent by entry of judgment at regular term of the Court, to correct the error complained of, and that having been done, counsel for respondent respectfully submit that they are entitled to an affirmance of such judgment in this Court.

FIELD, J., delivered the opinion of the Court—TERRY, C. J.; and BURNETT, J., concurring.

The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend upon the character of the reference; whether it be special, to report facts, or general, to report upon the whole issue. In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the Court, and judgment may be entered thereon, and the decision be excepted to, and reviewed, in like manner as if the action had been tried by the Court. Upon facts found, whether by report of the referee, or special verdict of a jury, the direct action of the Court must be invoked before judgment can be entered. Though the trial, in such cases has ended, judgment does not follow immediately as a matter of course; and the time within which the notice of motion to set aside the report or verdict must be given should be the same in the two cases, and date from the filing of the report or the rendition of the verdict.

But where an action is tried by the Court without a jury, the judgment follows immediately, as the conclusion of law upon the facts found. So, also, upon a report of a referee upon the whole issue; his decision stands as the decision of the Court. The

entry by the Clerk, in both cases, is a matter of course. Of the decision of the Court or referee, either upon the facts or law, the parties can have no knowledge until it is announced in the form of a judgment or a direction for its entry. It is seldom that the decision is rendered immediately upon the closing of the testimony. The necessity of stating, in writing, the facts found and conclusions of law, generally causes an interval of several days between the trial and judgment; and if the right to move to set aside the report or judgment dated from the trial, it could seldom be of any avail to the party against whom it is rendered.

In *Headley v. Reed*, (2 Cal., 325,) it was held that the District Court had no right to entertain any objections to the report of a referee until after the rendition of judgment thereon. The distinction between a reference to report special facts and a reference upon the whole issue does not appear to have been called to the attention of the Judge who delivered the opinion in that case, and we think its general language should be limited to cases where a judgment is ordered to be reported.

In *Sloan v. Smith*, (3 Cal., 406,) Murray, C. J., in considering the objection taken to the judgment, that the referees were not sworn, said, *arguendo*: "The order of the Court is to report a judgment; the evidence is not a necessary part. On the filing of the report judgment is entered as a matter of course; and the only mode in which a party can take advantage of it is by moving to set aside the judgment, as on a motion for a new trial."

It follows from the views we have taken, that the right of the appellant to make his motion and prepare his statement, dated from the entry of the judgment on the 28th of March, 1857, and not from the filing of the report or the trial before the referee. The judgment previously entered by the clerk in vacation was reversed on appeal, as a nullity, and could not affect the appellant's right to move, upon the rendition of judgment by the Court.

This disposition of the preliminary objection of the respondent brings us to the consideration of the case on its merits. The action is to recover damages for deceit in relation to the title of land sold and conveyed to the plaintiff. The alleged deceit consisted of representations by the defendant, made in a conversation with the agent of the plaintiff whilst negotiating for the land, that he was the owner of the property, and had purchased it of Thomas O. Larkin, which representations, it is averred, induced the purchase, and were falsely and fraudulently made. The conveyance to the plaintiff included a covenant to warrant and defend the grantee, his heirs and assigns, in the title to the premises from the grantor, his heirs and assigns, for ever; and with its execution, possession of the premises was delivered to the plaintiff, who remained in the undisturbed occupation of them

for years. In 1853, Larkin recovered judgment in an action of ejectment against the plaintiff and one John T. Peabody, and in January, 1855, issued execution for the possession of the premises. Whether an eviction was actually had under this execution it is unnecessary to determine; for the purpose of this appeal it will be assumed that an eviction took place. Of the action the defendant received no legal notice, and the judgment cannot, therefore, be evidence against him of a paramount title in Larkin. Mere cognizance of the existence of the action is not notice in the legal sense. To be available, the notice must apprise the party whose rights are to be affected, of what is required of him, and the consequences which may follow if he neglect to defend the action. (*Miner v. Clark*, 15 Wend., 425; *Clark v. Baird*, 7 Barb., 65.) Previous to the commencement of the ejectment-suit the plaintiff had conveyed the premises to a third party, and subsequent to the alleged eviction they were re-conveyed back to him.

The covenant in the deed to the plaintiff is a limited covenant expressed, in which all implied covenants are merged, even if it be admitted, which is a matter of doubt, that any covenants would otherwise be implied from the granting words of the conveyance. (*Sanders v. Betts*, 7 Wend., 287; *Frost v. Raymond*, 2 Caines, 192; *Rawle on Cov. for Title*, 361.)

The same doctrine prevails in the civil law. In the civil law there are two kinds of warranty—warranty in law or implied warranty, and warranty by deed. The parties may add to the warranty in law, “and they may likewise restrain the warranty in law; as if it be agreed that the seller should only warrant against his own proper act, and not against the rights of other persons, or that he shall only restore the price in case of eviction, and not the damages.” (1 *Domat's Civil Law*, §§ 375, 376, 377.)

The question, then, presents itself, whether an action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate can be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants. The precise question does not appear to have been directly decided. There are dicta in the reports, but we have been unable to find any adjudged case on the exact point. The deceit for which actions have been sustained has generally consisted of representations respecting the location, quantity, quality, or condition of the land sold, the privileges connected with it, the incumbrances upon it, or the rents or profits derived therefrom. In *Wardell v. Fosdick*, (13 Johns., 325,) the land which the deed purported to convey had no existence, and it was held that the purchaser might treat the deed as a nullity, and maintain an action for the deceit. The land not being in existence, there could of course be no possession, and no eviction, and consequently no remedy had upon the covenants,

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and if the action could not have been maintained, the purchaser would have been remediless. In *Monell v. Colden*, (13 Johns., 396,) the representation related to a pre-emptive right, which the purchaser would acquire under the laws of New York, as riparian proprietor, to a patent of the adjacent land under the waters of the Hudson river, and the Court, in sustaining the action, said: "The false representation was not respecting anything to be *included in the deed*, but with respect to a *privilege*, which the plaintiffs were to acquire in consequence of owning the land on the shore adjoining the river." In *Leonard v. Pitney*, (5 Wend., 31,) the deed was a quit-claim, without covenants, and Marcy, J., said: "Doubts may well be entertained whether an action at law will lie for a deceitful and false representation of title, in the vendor of real estate. Such an action has not, as yet, I believe, been sustained, except it may be in some of the States where the same tribunal is possessed of equity jurisdiction, as well as the powers of a Court of common law." The question was, however, undecided, and the case passed off upon another point.

In *Culver v. Avery*, (7 Wend., 380,) the representation made was that the premises were clear of incumbrances, and that the purchaser would acquire a perfect title; and *Sunderland, J.*, in his opinion, adverted to the distinction made between a false representation relating to the title of the land conveyed, and a false representation relating to some collateral thing attached to it, and observed that the circumstance of the representation being made in reference to the *title* did not vary the principle upon which the action rested. The distinction was not taken by counsel, or required by the case, and the opinion on the point can be regarded only as a dictum of the Judge. In *Whitney v. Allaire*, (1 Com., 313,) *Gardner, J.*, agreed in his views with *Mr. Justice Sunderland*; but *Bronson, J.*, in the same case, after citing several authorities, observed that in none of them was the false representation upon the naked fact of title; that he did not find *that such an action had ever been maintained*; and that it was a strong argument against the action that no precedent for it had been found, and said: "In the usual course of business, men insert covenants in their conveyance of real estate, when it is intended that the vendor shall answer for the goodness of the title, and it is easy to see that bad consequences may follow if the vendee shall be allowed to lay aside his deed, and have an action founded upon conversations about the title pending the bargain." The point was not settled by the decision, and the question may be still considered an open one in the Courts of New York. (See, also, *Bostwick v. Lewis*, 2 Day, 250, and *Wade v. Thurman*, 2 Bibb, 583.)

In *Dobell v. Stevens*, (3 Barn. and Cress.,) the false representation related to the business done at a public-house and the rent

received for a part of the premises, and the Court, in its opinion, said: "The representation was not of any matter or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance; but was altogether collateral to it, as was the rent in the case of *Lysney v. Selby*." (2 Lord Raymond, 1,118.)

In the execution of a conveyance, all previous representations pending the negotiation for the purchase are merged. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined. The possibility of a failure of title is a matter of consideration between the parties, and when the purchaser desires the goodness of the title guaranteed, he requires covenants to be inserted in the conveyance; but if he assumes the risk of the title, he accepts a deed without covenants. In the latter case, upon failure of title, he is without remedy for the purchase-money; in the former he is confined to his covenants. When, by the express terms of his conveyance, the vendor has fixed the extent of his liability, upon the failure of title, and the conveyance is accompanied with the delivery of possession of the premises sold, and there have been no false representations as to their quality, quantity, or condition, or as to the incumbrances upon them, or the rights or privileges appurtenant to them, or rents or profits arising from them, we cannot perceive any just ground upon which the purchaser, for a defect of title, instead of seeking his remedy upon the covenants of his deed, should be permitted to maintain an action for representations respecting such title, made in the negotiation for the purchase. Such representations must, in the great majority of cases, rest in the indistinct and confused recollection of witnesses; and if the doctrine contended for is upheld, it is easy to see, as says Bronson, J., in the case cited above, "that bad consequences may follow." In the case at bar, the only evidence as to the representation of the defendant is given by a witness nearly six years after the conversation occurred, in which it is alleged to have been made. In his direct examination, to the request to state the conversation, the witness replied that he did not recollect the whole of it, but the substance of it was, that the defendant "had the certain piece of property, and would sell it on favorable terms;" and, subsequently, to the question as to the representations, he answered, that the defendant represented that he was the owner of the property, and had purchased it of Larkin, without giving the language of the defendant; and, on his cross-examination, when requested to state the terms of the representations, he said the defendant "spoke of having such a piece of property—he might not have used the term of owning it."

It is apparent, from these answers, as well as from the state-

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ment of the witness, that his recollection of what transpired was very imperfect. He answers with positiveness only when the answer desired is indicated by the leading questions asked. The principle which requires all evidence of verbal statements to be received with caution applies with peculiar force to the present case, where there has been so great an interval of time between the statements made and the evidence of them given, and it is sought to base upon them a charge of fraud.

The representation that the defendant had purchased the property of Larkin would seem to be true, from the finding of the jury, in the ejectment case; but, whether true or false, it cannot help the plaintiff, if the doctrine be correct that a false representation as to the naked fact of title, where a conveyance with covenants, general or limited, is executed, accompanied with delivery of possession of the property sold, will not support an action for deceit. Assuming the fact, which is not proved, that the title to the property was originally in Larkin, the allegation of the possession of a conveyance from him was no more than that the defendant was the owner of the premises. The action is based upon the supposition that the title was originally in Larkin, and that the contract of purchase between the parties was made upon that supposition; the affirmation, therefore, of ownership, or of possession of a conveyance from Larkin, amounted to the same thing.

Besides, if the plaintiff did not think proper to trust to the affirmation of the defendant, he could have called for an inspection of the alleged conveyance, or examined the records where the deed to him states the conveyance is recorded; or he could have made inquiries of Larkin himself. His neglect to avail himself of these means of information, whether attributable to credulity or indolence, takes from his action all claim to favorable consideration, and the remarks of Chancellor Kent are applicable to his case: "The common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against the consequences of indolence and folly, or careless indifference to the ordinary and accessible means of information." (*Clark v. Baird*, 7 Barbour, 66.)

The judgment must be reversed, and the cause remanded.

## PEOPLE v. BARBOUR.

*The Court of Sessions is composed of the County Judge, and two Associates; and the presence of all is necessary to the transaction of business.*

*Therefore an entry in the records of the Court, when only the County Judge and one Associate were present, of the resignation of an absent Associate, and the appointment by the Court of a Justice of the Peace in his stead, is a nullity.*

*When an indictment is presented to a Court consisting of the County Judge and two Justices of the Peace of the County, the legal presumption is in favor of its validity.*

APPEAL from the Court of Sessions of Yuba County.

The facts appear in the opinion of the Court.

*Stephen J. Field* for Appellant.

At the December Term, 1854, the Court of Sessions opened with the County Judge and one Associate Justice. Thus constituted, it accepted the resignation of William Singer, one of the Associate Justices, declared his office vacant, and appointed Lloyd Magruder, Esq., a justice of the peace, to act as Associate Justice of the Court for the term, to fill the vacancy. Magruder took his seat on the bench, a grand jury was then summoned, by whom, among other things, an indictment was found against the defendant.

The defendant was indicted under the fiftieth section of the act concerning crimes and punishments. That section was amended by the Legislature on the eleventh of April, 1855.

The amendatory act does not change the punishment prescribed by the original act, and so far as the offence is concerned for which the indictment is found, the language of the two acts is identical.

The defendant moved to quash the indictment, and proceedings thereunder, on the grounds: first, that the Court of Sessions, in which the indictment was found, was not legally constituted; and, second, that the law under which the indictment was found had been repealed. The motion was overruled, and the defendant appealed and submitted the following points on appeal:

1. The Court of Sessions, as such, is not properly constituted, unless there are two Associate Justices with the County Judge. Without the three it cannot exist as a Court for any purpose.

No power, as a Court by the Constitution or law, to act at all, unless properly constituted.

No power in the Court to appoint at all, even if properly constituted. The law vests the power to appoint in the County Judge, not in the Court of Sessions. Act concerning Courts and Judicial officers, § 54. *The People v. Ah Chung*, 5 Cal., 103.

Is the law constitutional which vests the appointment in the

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County Judge? He can exercise no functions except of a judicial character. The appointment or designation of an Associate Justice is not a judicial act. The appointment or designation to an office is the exercise of a power or function appertaining to the executive department of government. *Dickey v. Hurlbut*, 5 Cal., 343.

The last provision of section eight, of article six of the Constitution, is controlled in its extent by article three.

A judicial act is one requiring the exercise of judgment upon rights which are the subject of inquiry or litigation. For the performance of a judicial act there must be a proceeding to which there are different parties.

2. The law under which the indictment was found has been repealed, and such repealed law has not been continued in force as to pending prosecutions, or as to violations of the law existing at the time of the repeal.

The amendatory act operates only in future. It cannot act retrospectively. Its existence commenced April 11, 1855, and the section of the old law under which the indictment was found, ceased that day. See *Smith's Comm.*, p. 892; *Commonwealth v. Marshall*, 11 Pick., 350; *Butler v. Palmer*, 1 Hill, 330.

The act of May 17, 1853, declaratory of the effect of the repeal of criminal laws, is of no effect. The penalty is a necessary part of the law, and it cannot exist when the law is gone. This act is too defective. To sustain an indictment and punishment, the repealed law must be continued in force as to pending prosecutions, or offences committed under it. *Comp. Laws*, p. 90; 1 *Blacks.*, 54.

*Thomas H. Williams, Attorney-General*, for Respondent.

Appellant urges two objections to the indictment:

1. That the Court was not legally constituted; and,
2. That the law under which the indictment was found had been repealed at the time the case was called for trial in the Court below.

In answer to the first proposition, I would remark that the Constitution, Article 6, section 8, provides that the County Judge, with two associates, to be designated by law, shall constitute the Court of Sessions, and I contend that the Associates Justices, in this instance, were designated substantially in the manner pointed out by law.

The law provides that the Associate Justices shall be chosen by the Justices of the Peace of the County, at a convention held for that purpose, over which the County Judge shall preside; and if, at any time, there shall be a vacancy, or one or both of the Justices shall not appear at the meeting of Court, then the County Judge may designate the requisite number to form the Court, from the Justices of the Peace of the County.

I presume that the part of the record which shows the acceptance of the resignation of Justice Singer amounts to nothing except so far as it proves a want of full bench, for the law does not require his resignation to be received, nor does authorize it: therefore, a record showing a fact neither required nor authorized by law, would, if attempted to be used for the purpose stated upon its face, prove nothing. So soon as his resignation was filed with the clerk, there became a vacancy which might be filled by the County Judge.

Then, the only question to be considered in this connection is whether the County Judge did designate Justice Magruder to supply, temporarily, the vacancy caused by the resignation of Justice Singer. If the record upon this point proves anything, it proves that the County Judge and one associate were sitting as a Court (to use the terms employed by the clerk,) and that said County Judge ordered that Magruder complete the bench, and Soules, Esq., (one of the regularly elected associates) concurred; whereupon the clerk made an entry, "Ordered by the Court, etc." In other words, the County Judge designated Magruder to fill the vacancy, and Soules concurred in the propriety of so doing. If it appears to this Court that the County Judge did act in the matter, then, clearly, it would make no difference how many persons so advised or concurred. Suppose that the record should show that the clerk and sheriff, who are named, also concurred, it could not affect the validity of the act of the County Judge. I apprehend that it must be clear to this Court that the County Judge did designate Justice Magruder, for as there were only two persons then upon the bench, a disagreement would have resulted in no appointment, provided the Judge consulted or regarded the disposition of his associate.

Again, I am of opinion that there is no legal evidence before this Court of the manner or circumstances of the appointment of Justice Magruder.

It is clear that unless the law either requires or authorizes the clerk to make an entry upon his books, then such entry is not evidence of its contents.

Now, the clerk is only required to enter, under direction of the Court, all orders, judgments, and decrees proper to be entered, etc. Wood's Digest, page 88, § 8.

It is not his duty to enter, under the direction of the Judges, the proceedings and acts of the Judge, but the proceedings, etc., of the Court. Then it follows that, as the clerk is not authorized to enter the statement of appointment by the County Judge, of the associate, such a statement is not evidence.

No injustice can be done by the application strictly of the rules suggested, because the mode and manner of appointment of Associate Justice, could be brought before this Court, by a state-

ment of the case or bill of exceptions, neither of which has been done in this case.

The record shows that on the day the indictment in this case was found, the Court was composed of the County Judge and two Associates, and the presumption is (until the contrary is shown,) that the Court was legally and constitutionally organized.

It is contended that the designation of an Associate by the County Judge is not a judicial act, and therefore void, to which there are two answers:

1. That there is no legal evidence before this Court that the County Judge did designate either of the Associates, and,

2. The power to designate is given as an incident to the administration of justice, which should properly be exercised by one connected with the particular Court, and is as much judicial in its nature as the order to the proper officer to open and adjourn the Court, and the performance of many such things which arise during the proceedings of the Court.

The same objection might be raised to the entire system of organizing Courts of Sessions, which now prevails with us, for the associates are elected by Justices of the Peace (judicial officers,) in a convention acting under the County Judge. Yet this Court, in perhaps more than a hundred cases, have recognised, if they have not declared, the constitutionality of courts organized under that system, and I presume it is now too late to declare the entire proceedings of the Courts of Sessions, throughout the State, void.

The second proposition of appellant is answered by the act of May 17, 1853, Wood's Digest, page 325.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

Indictment for an assault with a deadly weapon.

This is an appeal from an order of the Court of Sessions, denying a motion to quash an indictment.

The objections taken to the indictment by appellant are:

1. That the Court in which the indictment was found was not constituted according to law.

2. That the law under which the indictment was found has been repealed, and that its provisions were not continued in force as to prosecutions pending under it.

The evidence relied on in support of the first point is an entry in the records of the Court, to the effect that, at the meeting of the Court, there were present the County Judge and one Associate; that the resignation of the absent Associate was read, and ordered to be accepted; and "it is ordered by the Court that Lloyd Magruder, Esq., a duly qualified and acting Justice of the

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Peace for said county, be and he is hereby appointed to act, for the present term, as Associate Justice," etc.

The Court of Sessions is composed of the County Judge and two Associates, and the presence of all is necessary to the transaction of business. (5 Cal., 103.)

If, at the time appointed for holding a term, either of the Associates be absent, it becomes the duty of the County Judge to designate some Justice of the Peace of the county to take the place of the absentee. Until this is done, there can be no Court for any purpose. There was no Court in session until Magruder was called to preside, in the absence of one of the Associates.

It is clear, therefore, that this entry is a nullity; it is not a record of the proceedings of a Court; and the fact that the clerk thought proper to insert it in a book used to record such proceedings, can give it no validity. The indictment was presented to a Court consisting of the County Judge and two Justices of the Peace of the county, and the legal presumption is in favor of its validity.

The act of May 17, 1853 (Wood's Dig., 325,) is a sufficient answer to the second objection.

Judgment affirmed.

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PEOPLE v. WINKLER.

The rule is well settled, upon the soundest principles of reason, that the language of a judicial opinion, in general, must be held as referring to the particular case decided. The allegation in an indictment for larceny that the property stolen is "of the value of two hundred and five dollars," without stating "lawful money of the United States," is sufficient.

APPEAL from the Court of Sessions of the County of El Dorado.

The defendant was indicted for the crime of grand larceny.

The allegation in the indictment is as follows: "The said Jacob Winkler, on the — day of —, A. D., 1857, and before the finding of this indictment, in the county aforesaid, one cow, of the value to wit: of \$100; one cow, of the value to wit: of \$80; and one steer, of the value to wit: \$25, and all of the value of over \$50, to wit: \$205, of the property of R. J. Howard, then and there being found, feloniously did steal, take, and drive away, contrary to the statute," etc.

To this indictment the defendant demurred, on the ground that the "same does not state facts sufficient to constitute the offence charged or pretended to be charged therein."

The Court sustained the demurrer, and the people appealed.

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People v. Winkler.

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*Thomas H. Williams, Attorney-General*, for Appellant.

The demurrer to the indictment was solely sustained upon the authority of the *People v. A. A. Cohen*, 8 Cal. R., 42.

The Court of Sessions, acting, as they supposed, upon the authority of the *Cohen* case, concluded that the cow and steer stolen by defendant should have been alleged of the value of over \$50, "lawful money of the United States."

If this Court meant in the above case to say, that as a matter of description, the character or kind of money should have been charged, so as to enable the defendant to require its identification by proof upon the trial, then it was correct. Otherwise, in error.

It is only necessary, under our practice, to charge the offence in the words of the statute. The *People v. Parsons*, 6 Cal. Rep., 487.

And that is done in this case. See *Wood's Digest*, page 337, Art. 1920.

The district-attorney followed precisely the old form as given in *Archbold*. See *Archbold's Crim. Plead.*, 4th American edition, page 159, and it is thus sustained by authority. See pp. 160, 167, 46 and 47.

[NOTE.—The new editions of *Archbold* do not contain the form referred to, for the reason that the distinction between grand and petit larceny has been abolished in England.]

The indictment is good under the statute. See *Wood's Digest*, page 289, §§ 244, 46 and 47.

*Sanderson & Newell* for Respondent.

This case comes up on demurrer to the indictment.

The ground of the demurrer is that the indictment does not state facts sufficient to constitute the offence attempted to be charged therein, because the same does not aver that the valuation placed upon the property is of the currency of the United States.

It only avers the property to be of the value of \$—— without stating of what currency. This is insufficient. The indictment should allege the value in lawful money of the United States.

Otherwise, how can the Court know what currency is intended? For aught the Court can know, it may be the currency of some other nation, and not sufficient in amount to charge the defendant with grand or petit larceny under our statute.

This point has been expressly decided by this Court in the case of the *People v. A. A. Cohen*, 8 Cal. R., 42.

It was upon the authority of the *People v. A. A. Cohen*, that the Court below sustained the demurrer to the indictment in the present case.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Indictment for grand larceny. Demurrer to the indictment. The demurrer was sustained, and the People appealed.

The only ground of the demurrer is, that the property was alleged to be of the value of two hundred and five dollars, without stating "lawful money of the United States."

The learned counsel of defendant have referred us to the opinion of this Court in the case of the People v. A. A. Cohen, (8 Cal. R., 42,) as sustaining the decision of the Court below.

It is true that the language of that opinion, taken without reference to the circumstances of the case, would bear the construction contended for; but the rule is well settled, upon the soundest principles of reason, that the language of an opinion, in general, must be held as referring to the particular case decided. In that case, Cohen was indicted for converting money to his own use whilst he was the bailee of another. The defect was in describing the thing converted. The thing stolen must be correctly described, for the purpose of identification; and, when a party is indicted for stealing coin, the kind of coin must be specified. (3 Chitty's Cr. L., 947, 960; Arch. C. P., 46.)

But in this case the defendant was indicted for stealing cattle, and the value of the animals stolen was alleged in the language of the statute. (Wood's Digest, 351, Art. 1920.) The statute defining the offence does not use the words "lawful money of the United States." The allegation of the value was sufficient, being as certain as the language of the statute. (The People v. Parsons, 6 Cal. Rep., 487.)

Judgment reversed, and cause remanded for further proceedings.

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### LEONARD v. HASTINGS.

L. advanced to H. \$476, and received from H., for collection, an order for the amount upon a party indebted to him. The order not being collected, L. returned it to H. and took H.'s note for the amount advanced. In a suit on the note H. set up as a defence, laches on the part of L., in not presenting the order, by means of which the debt was lost: *Held*, that if there were any laches, they were waived by the execution of the note.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

*Francis J. Lippitt* for Appellant.

*Janes, Lake & Boyd*, for Respondent.

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Jones v. Jackson.

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FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

In 1853, the plaintiff advanced to the defendant, who was on the eve of his departure from the State, the sum of \$476, and received from him, for collection, an order upon a patient for the amount, which was due for medical services. On the return of the defendant to California, the plaintiff delivered to him the order, the same never having been collected, and took the note in suit for the amount advanced. The defence set up was the laches of the plaintiff in not presenting the order by means of which the debt was lost. It was in evidence that the order was presented to the drawee with a request of payment, which was refused. This fact alone disposes of the defence. If there were any laches they were waived by the execution of the note.

Judgment affirmed.

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JONES *et al.* v. JACKSON *et al.*

The pay-dirt and tailings of a miner, which are the productions of his labor, are his property.

When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose; provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such or as a mining-claim.

To suffer the tailings to flow where they list, without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary.

If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass.

Where tailings are allowed to flow upon the ground of another, he is entitled to them.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action of trespass to recover damages for cutting and breaking dam of plaintiffs, erected below a tunnel mining-claim, for the purpose of collecting tailings wasted from said claim, and also for washing away tailings, destroying sluice-boxes, etc. Complainant prays for damages, and also for an injunction enjoining and restraining defendants from taking or interfering with the tailings flowing down the ravine from the tunnel mining-claim known as the Monte Cristo Claim.

Sometime in the summer of 1853, a company of miners, composed of several partners, located at or near Monte Cristo, in

Sierra County, a tunnel mining-claim. Two other companies, called the Swanton and Exchange Companies, located tunnel claims about the same period.

The Monte Cristo Company tunnelled into the mountain side over one thousand feet, and there reached a very rich lead of gold-bearing gravel and cement difficult and slow to dissolve. The company commenced washing pay-dirt from said tunnel in February, 1854, through a sluice about one hundred and fifty feet in length. The tailings from the sluice deposited themselves on a flat below, about five hundred yards in length. In October, 1854 or 1855, the company built a sort of a dam or obstruction, some distance below the lower end of their sluice, to prevent the tailings from passing down the stream, and also put up on a tree near by, a notice stating that they claimed the tailings for re-washing. The Swanton and Exchange Companies also deposited their tailings on this flat. There was usually a log laid down to divide and designate the tailings of these different companies; but it was often overrun and covered up, and thus the tailings of the different companies mingled together. This flat was the only place where the tailings could be deposited, as the banks were precipitous on either side, and it had been used for near two years for the deposit of all the tunnel companies in that locality.

About the first or twelfth of October, 1855, the defendants' grantors located and took up on this flat twenty surface mining-claims, under the name of the Express Company, and including the ground upon which the tailings of the Monte Cristo Company were deposited. They posted their notices on a tree a short distance above the head of the ground claimed by them, and soon after commenced working the ground. About three weeks after putting up the first notice, another was posted up near the middle of the claims. The testimony respecting the quantity of tailings on the flat and the existence of the dam of the Monte Cristo Company at the time of the location of the Express Company claims, is conflicting, but the weight of evidence is, that there were little or no tailings there, and no dam, but the dam was reconstructed in 1856. On the 22d of September, 1856, the plaintiffs purchased of the Monte Cristo Company all the tailings of this company on the flat, and also all the tailings and waste water that flows down from said company's claim for one year therefrom. Subsequently, when plaintiffs commenced to wash the tailings, defendants interfered, drove plaintiffs off, and with an axe cut up and destroyed their sluices and tore down the dam, and ran the tailings into defendants' flume. On the trial, certain instructions were given to the jury, and some denied. All of which appear in the opinion of the Court.

*Henry Meredith for Appellants.*

The plaintiffs requested, and the Court refused, the following instructions, to wit:

"2. To entitle defendants to wash the tailings from the Monte Cristo Company's tunnel, after being sold to plaintiffs, defendants must show they had purchased such tailings, or that such tailings had been permitted to run upon ground after such ground had been lawfully appropriated by defendants."

"3. And that a party turning tailings down upon a flat or ravine, not claimed by such party, with the intention of abandonment, loses his right to the same; but the pre-emption of abandonment, arising from the fact of their being turned loose, may be rebutted by other circumstances showing an intention to continue the claim; and a party turning out their tailings upon unenclosed and unoccupied ground, does not lose his rights to the same unless he intends by so doing to abandon."

The refusal of the Court to give these instructions as requested, and the exception of the plaintiffs to each ruling, first arises for consideration on appeal.

The propositions contained in these instructions are simple, adopted to the anomalous interests and wants of the country, and observed by general consent in the mining community.

The pay-dirt and tailings of a mining-company, are the products of its industry, and as such entitled to the fullest protection.

Every encouragement, which could be considered by State legislation and federal acquiescence, has been afforded to the outlay of labor and capital in acquiring the precious metals embedded within the rocks and mountains within our confines.

The fruits and results of such enterprises have so readily received the recognition and fostering care of our Courts.

When the auriferous earth has been raised and removed from its native bed, and brought forth from the deep interior of a mountain to its place of washing, it becomes a chattel or personal property, and must be regarded as the creation and product of the miner's labor.

There being both a severance and asportation, the matter is no longer part of the freehold, but personalty.

So long as its chattel character is preserved, the owner can not lose his right by the mere act of depositing it or accumulating it upon the public grounds or claims of another, when there is no intention of abandonment.

I may turn my horse out upon the commons, or the land of another, with the intention of reclaiming him, and he continues my property, though by the act of turning him out I committed a trespass.

The pay-dirt of a mining-company, so long as kept distinguishable from other soil, is as completely personal, and attended by like incidents.

The Court below seemed impressed with the erroneous opinion, that the tailings or sluiced pay-dirt of a mining-company should be treated by the same rules, and were attended by the same legal incidents as water or alluvion, and that upon whatever soil they were deposited or allowed to accumulate, they immediately attached as an incident to the land.

The authorities show such a consequence is an incident to the proprietorship of the soil, recognized by the common law.

The maxim, *cujus est solum, ejus est usque ad cælum*, is the foundation on which this incidental right depends. Angel on Water, 5, 6, 7, 8, 9; *Ib.*, 53, 54, 55; Black. Com., 2 B, pp. 161-2.

When we remember the parties are not owners of the land but were occupants of the public domain, this rule does not seem to apply.

Appropriation, while the origin is the limit to such a one's rights, and nothing merely superincumbent, is acquired by simple occupancy of the soil.

The owners of a mining-ditch turned out the water from it, with the intention of using the same, into a dry ravine or torrent-bed which had before been appropriated by others, and those others as prior owners of the ravine claimed such water: Held, by the Court, that such waters did not become the water of the ravine unless turned in with the intention of abandonment. *Hoffman v. Stone*, 7 Cal., Jan. Term.

In that case, the appropriation was of the water of the ravine, and the ravine itself for carrying such waters.

In the case before the Court, the defendants located the ravine for constructing their flume and washing the gold of the ravine. Water more readily re-annexes itself with and becomes part of the earth it flows upon, than do the tailings and gravel of a tunnel-company, unlike in color and nature from the natural surface, and which is kept in a distinguishable heap.

The plaintiffs, as the evidence shows, ran their tailings and gravel from their sluice-boxes, and confined them upon a flat below for a second washing.

Nature furnished this single level spot in that locality, and the grantors of plaintiffs, with other tunnel-companies, economized, by availing themselves of it as a reservoir for catching and holding the pay-dirt for such re-washing. For such an act to destroy their property to the valuable products of their expensive labor, or to entitle others, having no ownership in the land, subsequently to avail themselves of such products without compensation, is repulsive to justice; and to prevent the same, the Court was asked to instruct the jury that the intention of abandonment must accompany the act.

The instruction given by the Court was highly prejudicial to the plaintiffs, and was by them excepted to.

The concluding portion of the instruction is as follows: "But

if the jury believe, from the testimony, that the tailings from the Monte Cristo Tunnel were allowed to flow from their sluices upon mining-ground lawfully located by the defendants, or those under whom they claimed, there to mingle with the tailings of other companies than the Monte Cristo, they would have no right to reclaim the same, and could convey none to plaintiffs, and the jury should find for defendants, unless they believe more injury was done to the dam and sluices, than was necessary to remove the obstructions caused by them."

To incorporate the doctrine that confusion of goods creates property, was attempted in this instruction, but in the attempt the error occurs: That if the goods of A are suffered to mix with those of B and C, such confusion gives a right to a fourth person, D, to take the whole.

The doctrine of confusion of goods operates only in favor of the one whose goods are, without his consent, interfered with by the mixture, and when both and all the proprietors consent, they have an interest in common. Black. Com., 2 B., p. 405.

In this case it has before been remarked, the lofty and precipitous mountain into which numerous tunnels had been run, afforded but one spot on its side which could be used as a reservoir for catching tailings and pay-dirt for washing.

Upon this spot, or flat, the different tunnel-companies, with common consent, deposited and accumulated for a second washing their tailings and pay-dirt, keeping them separate as well as they were able, by shoveling apart and dividing by logs, etc.

The instruction of the Court announces this proposition as law: That if the Monte Cristo Company (plaintiff's grantor) permitted tailings and pay-dirt to flow down and mingle with the tailings of the Swanton Company, and other companies, though by the consent of all, that thus the Monte Cristo Company lost all right to its portion, and could convey none to plaintiffs, and that defendants, Jackson and Hughes, owning no part thereof, acquired thereby a right to take the tailings of all the companies.

Under this instruction, the rights of plaintiffs were made in the minds of the jury to depend and cease upon the confusion of plaintiff's goods with the goods of others, strangers to the suit, who consented to such confusion so far as it extended, and the rights of defendants, who could neither object nor complain of such confusion to accrue upon such happening.

The injurious effects of such an instruction upon plaintiff's case are manifest. From the steady customs and practice of the mining community on this subject, as likewise from reflection, we deduce the following conclusions, believing they will be found by this Court consonant with law, and its own previous rulings.

The conclusions are these, viz.:

The pay-dirt and tailings from a mining-claim are personal property belonging to those who detach the same from the earth,

and the ownership of such property is not lost by its being suffered to accumulate upon ground claimed by another, or upon vacant public ground, unless done with the intention of abandonment, or unless allowed to mingle with the tailings or pay-dirt of the owner of such mining-claims without his consent, and the possessor of a mining-claim in this State has not a freehold interest in the land, and while his rights are co-extensive only with his appropriation, the ownership of superincumbent property does not follow as an incident to his occupancy of the land for mining purposes.

*Francis J. Dunn* for Respondent.

The testimony is conflicting, but the weight of it is to this effect :

That the mining-claims at Monte Cristo are all worked through tunnels, and the refuse or wash from several companies, commonly called tailings, after passing from the sluice-boxes of said several companies, namely: the Monte Cristo, West Point, Exchange, and Swanton Companies, find their way—being propelled by water—into a ravine, and there mix and mingle together, and so remained unappropriated and unused until the predecessors of the plaintiffs, called the Express Company, located the grounds and ravine on which said mixed and mingled tailings had deposited, for mining purposes, including the washing of the tailings. Defendants, who, by purchase, were the owners of the Express ground or mining-claims, commenced washing, and did wash the tailings that had deposited and were being deposited from the Monte Cristo and other mining-grounds, as aforesaid, when plaintiffs built a dam, which stopped and set back said tailings, (and that within defendants' claims,) and prevented them from flowing as they were accustomed to, and had before that done; which dam, defendants deeming a nuisance to them, abated in a peaceable and quiet manner, and for which plaintiffs brought suit for damage, and obtained an injunction against defendants restraining them from washing the tailings or interfering with the dam. The plaintiffs, it is true, endeavored to show that the Monte Cristo Company had built a dam before defendants' location of claims to catch tailings, but on this there was conflict of testimony, and from the whole of it, when weighed, the jury concluded that they had built no such dam, and never, until the location of defendants' mining-claims, noticed or claimed the tailings from their claims, but had abandoned the same, and it was only after the labor of defendants proved the tailings to be valuable, that claim to the tailings was set up by the said Monte Cristo Company or plaintiffs.

The jury found for defendants, and the Court entered a judgment accordingly, and overruled a motion for new trial made by plaintiffs, and dissolved the injunction theretofore awarded them.

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Jones v. Jackson.

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Respondents make the following points, and recite authorities as follows, to sustain them :

1. That every point made by appellants is unsustained by law and the authority cited by them.

2. The two instructions asked by the plaintiffs, and refused by the Court, were not law, and the Court below committed no error in rejecting them. The first amounted to this: That defendants had no right to any tailings deposited on their mining-claims from the Monte Cristo or any other companies, unless by purchase after the time that defendants or predecessors located; and the second instruction was of the same purport, but more objectionable. Both, if given, would destroy all rules of abandonment, mingling, or estoppel *in pais*. Shady Creek Company v. Grizzly Ditch Company, Cal. Rep. Law Dict., Title, Abandonment.

3. The instructions given by the Court, and not at the request of either party, were certainly as unobjectionable as instructions could be. Respondents are content, without further comment, to refer to them.

4. The Court should not have granted the plaintiff a new trial, as the verdict was with the weight of evidence, but even had it been balanced, this Court will not disturb the verdict of the jury, or the discretion of the Court below, as to awarding new trials. Speck v. Hoyt, 3 Cal. R., 413; Doak v. Palmer, 2 Cal. R., 177; Taylor v. McKinley, 4 Cal. R., 104; Watson v. McClay, 4 Cal. R., 288; Bartlett v. Hogden, 3 Cal. R., 55; Wood v. Forbes, 5 Cal. R., 14; Cohn v. Gower, 5 Cal. R., 55; Buell v. Bear R. Co., 5 Cal. R., 6.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The Monte Cristo, Swanton, and Exchange Companies located separate claims for tunnel-mining, at or near the head of a very steep ravine, in 1853. The different tunnels of these different companies penetrated under the mountain, to the distance of several hundred feet, where they found rich deposits of gold, in a hard formation, like cement, which did not dissolve readily in water, until after exposure to the atmosphere for a considerable space of time. From the character of this formation, it resulted that the first washings only extracted a portion of the gold, leaving the other portion to flow off with the tailings, which were deposited on a flat, several hundred feet below the mouths of the tunnels. The owners of the Monte Cristo tunnel posted a notice, in 1854, stating that they claimed the tailings running from their sluices, and that they intended to wash the tailings again. The tailings from the different tunnels were partially mingled, though some effort was made to keep them distinct. The mass of tailings could readily be distinguished from the soil

of the flat on which they were deposited, by the difference in color and appearance; and the flat was the first point where, from the natural features of that locality, the tailings could find a resting-place. In the summer of 1855, the parties under whom the defendants claim, located some twenty claims, called the Express Company's claims, on this flat, including a portion of the ground upon which the tailings were deposited. The Monte Cristo Company sold their tailings to plaintiffs, who went upon the flat, and erected their sluices, which were abated by the defendants, under a claim of right. This suit was brought to recover damages for the injury. The defendants had judgment in the Court below, and the plaintiffs appealed.

The Court, at the request of the plaintiffs, instructed the jury that "if they believed that the Monte Cristo Company were the first to appropriate the ground covered by the tailings, and, while continuing to hold and claim the same, said company conveyed the tailings caught or stopped on said ground to plaintiffs," and that afterwards the defendants did the injury complained of, then the plaintiffs were entitled to a verdict.

After giving the first instruction, the Court refused to give the second, as follows: "To entitle defendants to work the tailings from the Monte Cristo Company, after being sold to plaintiffs, the defendants must show that they had purchased said tailings, or that said tailings had been permitted to run upon ground after such ground had been lawfully appropriated by defendants."

This instruction was properly refused, as it was too broad in its terms. By it, the defendants were not permitted to wash the tailings deposited upon the claims, *before* they took them up, even conceding the intention of the Monte Cristo Company to abandon them.

The pay-dirt, as it is called, and the tailings, were certainly the production of the labor of the company, to which they were justly entitled, under proper circumstances. When a place of deposit for tailings is necessary, for the fair working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be reasonably necessary for *this* purpose; provided, he does not interfere with pre-existing rights. His intention, however, should be clearly manifested by outward acts. Merely posting a notice would not seem to be sufficient. To suffer the tailings to flow where they list, without obstructions to confine them within the proper limits, is conclusive evidence of abandonment, unless there is some peculiarity in the locality, constituting an exception to the rule. It may happen, in some localities, that no artificial obstruction would be required to confine the tailings within the proper limits. In such case, it would not be necessary to do an idle thing. But in this instance, the flat was some five hundred yards long.

The Court further instructed the jury, in substance, that if the Monte Cristo Company constructed a dam upon *vacant* ground, for the purpose of catching the tailings, and then sold them to plaintiffs, and the defendants *afterwards* did the injury alleged, the plaintiffs were entitled to a verdict. But, if the tailings were allowed to flow upon mining-ground, lawfully located by defendants, or their predecessors, there to mingle with the tailings from other companies, then the plaintiffs could not recover.

It would not seem to be true, that the mingling of the tailings from different claims would give a stranger any right to the mixed mass. It may be a circumstance to prove the *intention* of those who permitted them to be thus mingled, so as to show an abandonment. But this is the extent to which such a fact can go. If A can have a right to a place of deposit, B may have, also; and if they can have such right separately, they can mix their property, if they please so to do. If parties voluntarily mix their property, this does not give a mere stranger any right to the mixture. The parties hold in common. (2 B. Com. 405.)

But this feature in the instruction could do the plaintiffs no injury. If we strike out this portion of the instruction, then the objection would be removed, and still the plaintiffs left in the same position. By the instruction, the Court required the jury to find *two* grounds to be true, in order to justify the defendants, the last of which was immaterial; but it could only injure the defendants, and not the plaintiffs. Whether the tailings were mingled or not, the defendants were entitled to a verdict, if the tailings were flown upon their own claims.

The third instruction offered by the plaintiffs was, also, properly refused. The substance of the instruction was, that a party turning tailings down upon a flat not claimed by him, is presumed to abandon them; but this presumption may be rebutted by other circumstances, showing an intention to continue the claim; and the act of the parties, in turning their tailings upon unoccupied ground, does not forfeit their right, unless they intend, by so doing, to abandon.

The place of deposit must be *claimed* as such, or as a mining-claim; and the intention of the claimant must be manifested by outward acts. The rights of others being concerned, the intention not to abandon is not sufficient *alone* to sustain the right. Although the intention not to abandon the right may in fact exist, and may be susceptible of clear proof, still the party may fail for want of a clear manifestation of that intent. The instruction placed too much stress upon the intention of the party. The instructions given by the Court were better applicable to the facts of the particular case. As an abstract proposition of law, the third instruction was not so far wrong; but its terms

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were too broad for the circumstances of the case, and might have misled the jury.

There was some contrariety in the testimony. The instructions fairly submitted the question to the jury, and their verdict seems to have been warranted by the testimony.

Judgment affirmed.

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### McCANN v. LEWIS.

The possession of a promissory note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved, unless a defence is interposed which would otherwise preclude a recovery.

An agreement for the extension of the time of payment, if without consideration, is void.

APPEAL from the District Court of the Eleventh Judicial District, County of Yolo.

The facts appear in the opinion of the Court.

*Wallace & Rayle* for Appellant.

*Smith & Hardy* for Respondent.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

This is an action upon a promissory note, payable to Sarah Ann Cooper, or bearer. The answer admits the execution of the note, but denies its transfer to the plaintiff for a valuable consideration, and sets up that Sarah Ann Cooper was, at the time, the wife of C. Cooper, and that the consideration of the note proceeded from him; that, in April, 1856, he agreed to extend its payment to April 15th, 1858, provided the interest was paid at the end of every twelve months; that he died prior to April 15th, 1857; and that no administration has been had on his estate.

The only question raised by the record is, whether the facts alleged in the answer constitute a defence to the action. The offer of the defendant to prove them was refused, and it being admitted that the plaintiff was the holder of the note in suit, judgment was rendered in his favor.

The possession of a note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The averment of a valuable consideration for the transfer to the plaintiff is gener-

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ally immaterial. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved, unless a defence is interposed which would otherwise preclude a recovery. (*James v. Chalmers*, 5 Sand., 52; and 2 Selden, 209.)

The agreement for the extension of the time for the payment of the principal of the note was without consideration. It conferred no rights which the holder did not already possess.

It is difficult to perceive what effect the death of Cooper, the husband, can have upon the action. It is not alleged that the transfer of the note was afterwards made to the plaintiff, or that the defendant has any substantial defence to the note in the hands of Sarah Ann, or the representatives of the deceased husband. It is evident that he feels a much more lively interest in postponing its payment than in protecting the estate of the intestate.

The objection to the interest allowed on the judgment, was considered in *Guy v. Franklin*, (5 Cal., 416,) and the rule there laid down was affirmed in *Emeric v. Tams*, (6 Cal., 155.)

Judgment affirmed, with ten per cent. damages.

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WING v. OWEN *et al.*

A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

*John Currey* for Appellant.

*Whitman & Wells* for Respondents.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., concurring.

In this case no statement was filed setting forth the grounds upon which the defendants intended to rely on their motion for a new trial. The failure to file such statement operates as a waiver of the right to the motion. (*Practice Act*, sec. 195; *Adams v. The City of Oakland*, 8 Cal., 510.)

The order granting a new trial is reversed, and the cause remanded.

PAGE v. ELLIS *et al.*

Where suit was brought in the District Court on an undertaking on appeal to the Supreme Court, given in the sum of three hundred dollars, conditioned to pay all damages and costs, not exceeding the three hundred dollars which may be awarded by the Supreme Court, and the damages and costs so awarded were only thirty dollars and fifteen cents: *Held*, that the District Court had no jurisdiction.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This action was brought against Asa Ellis, and Elbridge Ross, and A. D. Stewart, his sureties on an undertaking on appeal to the Supreme Court. The undertaking is in the sum of three hundred dollars, and conditioned that "Asa Ellis (appellant in the undertaking) shall well and truly pay all damages and costs, not exceeding three hundred dollars, which may be awarded by said Supreme Court against said Ellis on said appeal." The appeal was dismissed by the Supreme Court, and judgment was entered in the Court below against said Ellis, for the amount of the debt, and also for the sum of thirty dollars and fifteen cents damages and costs, awarded by the Supreme Court on said appeal. Execution was issued on this judgment, and returned not satisfied. Thereupon the plaintiff instituted this suit. The defendants demurred to the complaint of plaintiff, on the ground that the complaint showed that plaintiff was only entitled to recover the sum of thirty dollars and fifteen cents, and that the Court had no jurisdiction. The demurrer was overruled, and the defendant raised the same objection to the jurisdiction in their answer. Plaintiff had judgment, and the defendants appealed.

*F. L. Hatch* for Appellants, Ross and Stewart.

1. That the Court below should have sustained their demurrer. The pleadings show that the District Court had no jurisdiction of the subject-matter of the action. The complaint does not show facts sufficient to constitute a cause of action in the District Court against the appellants. It shows that the appellants, as sureties for defendant Ellis, by their undertaking rendered themselves liable only for the costs and damages which might be awarded in the Supreme Court, and not for any portion of the original judgment which was obtained by the plaintiff, against defendant Ellis.

The complaint also shows that the costs and damages awarded by the Supreme Court in the case amounted to only thirty dollars and fifteen cents.

For this amount only, are the appellants liable to plaintiff

upon the undertaking which is the foundation of this action, and which is set out in the complaint.

For this amount the plaintiff has his action against the appellants, but not in the District Court, that Court having no jurisdiction of an amount under two hundred dollars. § 6, Art. 6, Const. of Cal.

2. As to the object, effect of, and the liability created by such an undertaking as is set out in the complaint, see Article 1082, Wood's Digest.

The undertaking in this case was merely given to "perfect" the appeal. It was drawn under Art. 1082. It was not such an undertaking as the statute requires to stay the execution of the judgment.

The next article, 1083, prescribes the character of such an undertaking. It is only where such an undertaking is given as will stay the execution, that the sureties are liable for any part of the judgment appealed from.

3. If the District Court could take jurisdiction of the case, the judgment should have been for the amount of the damages and costs awarded by the Supreme Court—that is for thirty dollars and fifteen cents—the plaintiff paying all the costs of this action. Art. 1227, Wood's Digest.

*Bryan & ———* for Respondent.

1. Are the defendants' sureties liable for more than mere Supreme Court costs (which in all cases are scarcely more than nominal,) or are they liable for the costs made below to the extent of their bond, the filing of the same operating as a stay of execution.

The invariable practice has been to hold them to the extent of the bond for all of the costs, both above and below. The bond operates in this case as a stay of execution.

The respondent is by its filing injured and delayed in collecting his costs, and in fact in many cases will be prevented altogether from obtaining his costs on account of the filing of such a bond, if the appellant be correct.

The principal may become worthless or fail in the mean time.

2. Our statute provides that the bond should be conditioned "to the effect that appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars." Wood's Digest, p. 211, § 348.

The Court in dismissing this case awards costs; and the costs below to the extent of the three hundred dollars, as a matter of course, are awarded by the decision of this Court.

But it is not necessary to multiply words in this case. This Court has given a construction to the section quoted, which is directly in point and settles the question, if there was ever any

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doubt about a thing so plain. Mayor etc., of Marysville, v. R. B. Buchanan, 3 Cal., 212.

In nine cases out of ten we never could obtain costs below unless upon the bond upon the awarding of the Supreme Court.

The bond operates as a stay to the amount of the sum named. Whilst the appeal is pending the judgment-debtor fails or runs away. The bond secures him, and might be called, by a liberal use of language, *particeps criminis*. The bond, then, should pay.

Believing this to be a frivolous appeal for delay, we feel justified in asking the Court to affirm the judgment with damages, that will discourage such trifling appeals in the future.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., and FIELD, J., concurring.

The undertaking sued on was executed under the provisions of the three hundred and forty-eighth section of the Practice Act, and did not operate to stay execution on the judgment of the Court below; its object was simply to secure the payment of such damages and costs as should be awarded in the Appellate Court, and as the complaint shows that the damages awarded are less than two hundred dollars, the District Court had no jurisdiction.

Judgment reversed.

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PEOPLE v. MACKINLEY.

A party cannot be convicted of larceny for taking his own property.

APPEAL from the Court of Sessions of the County of San Francisco.

*Janes, Lake & Boyd, and Yale*, for Appellant.

*Thomas H. Williams, Attorney-General*, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

The defendant was indicted for the alleged conversion to his own use, whilst bailee, of a quit-claim-deed made and executed by Thomas J. Alsbury to defendant. The defendant demurred; the demurrer was overruled, and the defendant appealed.

The demurrer should have been sustained. The deed having been "*made and executed*," as alleged in the indictment, by Als-

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bury to Mackinley, was the property of the latter, and could not be stolen by him.

Judgment reversed, and cause remanded.

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### GERKE v. THE CALIFORNIA STEAM NAVIGATION COMPANY.

The declaration of the master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, are admissible to establish the liability of the owners, in an action against them to recover damages for the destruction of the crop.

Steamboat and railroad companies, in propelling boats on the river, and cars on the railroad, must provide all reasonable precaution, to protect the property of others, and they must also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to the circumstances of the danger.

What facts and circumstances constitute evidence of carelessness, is a question of law for the Court to determine. But what particular weight the jury should give to these facts and circumstances, is a matter for the jury.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The facts necessary to understand the points decided, appear in the opinion of the Court.

*Janes, Lake and Boyd*, for Appellants.

1. The Court erred in allowing the eighth question and answer in the deposition of McConoughay. The declarations of the master are not evidence against the owner, unless part of the *res gestæ*. *Farle v. Hastings*, 10 Vesey, 126; *Innes v. Steamer Senator*, 1 Cal., 459; *Mateer v. Brown*, 1 Cal., 221; 1 Greenleaf, 126.

The Court erred in overruling the motion for a nonsuit, there being no evidence of negligence on the part of the defendants. *Rood v. N. Y. and Erie R. R. Co.*, 18 Barb., 80; *Cook v. Champlain Nav. Co.*, 1 Denio, 91; *Railroad Co. v. Yeiser*, 8 Barr, 366; *Radcliff Ex. v. Mayor of Brooklyn*, 4 Com., 195; *Stuart v. Hawley*, 22 Barb., 619; *Baltimore and S. R. R. Co. v. Woodruff*, 2 Miller, Maryland R., 242, cited in 3 Liv. Law Mag., 180.

*E. Cook* for Respondent.

The authorities cited by the defendants' counsel merely go to show that there must have been negligence on the part of the

persons in charge of the boat, and so the Court charged the jury.

But we insist that the defendants, or the person in charge of their boat, were bound to know whether they could pass in safety.

See *Dygert v. Bradley*, 8 Wendell, 469, which was an action of trespass against the master of a boat navigating the Erie Canal, in New York, for running her against another boat lying in the canal, waiting her turn to pass the locks. It was held in that case, that the defendant, before he undertook to pass, was bound to know whether there was room (although boats had passed there for two years,) and there not being room, in consequence of which he pressed the plaintiff's boat so hard as to sink her, it was held, that the defendant was liable.

Now, it is not necessary to go so far in this case, for the reason, that any provident person must have known the danger of passing through the fields of grain, under the circumstances.

The rule of law governing this class of cases is well stated by Judge Cowen, in his treatise of Courts of Justices of the Peace, at vol. 1, p. 384.

The Judge says, speaking of an action on the case for damages: "It lies in all cases of negligence in the use or disposition of one's property, or in clearing or improving it, by which another is injured, and the true question in such case is, whether the defendant, or his servant, has been guilty of negligence. For it is a maxim in law, that a man is bound to use his own, as not to injure that which belongs to his neighbors. For example, he has a right to burn over his own fallow ground, or keep fire in his house, but if he or his servant carelessly suffer his fire to escape from his fallow, or set it on fire in a dangerous, dry, or windy time, or do not take proper care of it; if he or his servant should keep the fire carelessly in the house, by which it took fire and burned down his neighbor's house, he would be accountable in each of these cases, for any damage done to his neighbor."

And in the case of *Wakeman v. Robinson & Bingham*, (8 Eng. Com. Law Rep., 478,) it was held that if an injury occur, and any blame is imputable to the defendant, the action can be maintained, though the party be innocent of any intention to injure, as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, etc.

See, also, the case of *Chaplin v. Harvis*, 3 Car. & Payne, 534, (14 Eng. Com. Law Rep., 711,) and in the case of *Earing v. Tarnsurgh*, 7 Wendell, 185. It was held that when two parties meet upon the highway, each party must keep to the right of the centre of the road, and the fact that it was more difficult for the party who caused the injury to turn out than the party who

was injured, was no excuse, unless the obstacles to turning out were insuperable, or extremely difficult.

And in the case of *Cook v. The Champlain Transportation Company*, 1 Den., 92, which was an action for the negligent destruction of buildings by persons in charge of a steamboat, by fire, it was held that the owner of land on the shore of a stream or lake, though the situation be one of exposure and hazard, is, nevertheless, entitled to protection against the negligent acts of persons lawfully passing with vessels or carriages, propelled by steam-engines, by which buildings are set on fire.

The doctrine governing the case is very ably discussed, and the authorities cited in the case of *Hagett v. Philadelphia and Reading Railroad Company*, 11 Harris Penn. R., reported in 23 Penn. State Reports, 375.

This was an action brought against the railroad company for negligence and carelessness in the management of their locomotive, whereby plaintiff's house, near defendant's road, was burned.

In that case, as in the case under consideration, it appeared that the weather was very dry and windy, etc., and that sparks were thrown fifty yards, (in our case brands of fire were thrown one hundred yards,) and that fields were set on fire in several places, about the same time.

And the defendants in that case proved, (what was not attempted in this case,) that their engines were in good order, and provided with spark-catchers.

The Court below, under the decision of the same State, (8 Barr, 366,) and which is relied upon by the defendants' counsel in this case, nonsuited the plaintiff. But the Supreme Court reversed the decision, and held that the case in 8 Barr did not decide what was evidence of carelessness, but that it must be judged by the jury, from all the evidence, as to what constituted carelessness. And the Court further says :

"The company has paid for its right-of-way, etc., but this does not cover all sorts of damages," and cite 10 Mees. & W., 425; 15. Beav., 322, S. C.; 19 Eng. Law & Equity Rep., 295; and then proceed, "and it cannot cover damages arising from negligence, for the law never anticipates this in assessing damages, and it never allows people to purchase a general immunity for carelessness. If it did, no railroad would pay the price in advance. This company, therefore, must submit to have the question of carelessness tried in this case, just as it is in others.

"They are bound to temper their care according to the circumstances of danger, (20 State Rep., 177,) and exert more care when the property of others is in danger than when it is not; and their evidence will be tried by this rule, and if there be evidence of carelessness, the means of rebutting are so entirely i

the defendants' power, that it is not unreasonable to expect from them that their evidence should be very complete."

The learned counsel for the defendants also relies upon the case of Radcliff's executors v. Mayor of Brooklyn, 4 Comstock, 196.

Justice Bronson, in that case, reviews the case very ably, and his opinion is strongly in our favor.

He holds that a party is liable for the lawful use of his own property, if thereby his neighbor is injured, provided he is guilty of negligence, and the cases cited by the counsel from 18 Barbour, 81, and 22 Barbour, 619, do not conflict with the law as laid down by Judge Hager. They simply decide that negligence must be shown in order to recover.

The maxim, "*sic utere tuo ut alienum non lædas*," is fully discussed, and the cases upon the subject reviewed in the case of Carson v. Godly, 26 Penn. State Rep., 111, and we invite the attention of the Court to a perusal of those cases.

Again, the plaintiff having shown an injury to his property, and that it was caused by the defendant's servants, it was the duty of the defendants to show how the boat was managed upon the occasion. Barb. v. Johnson, 23 Penn. State R., 213.

The counsel insists that the Court erred in admitting the declarations of the master.

These declarations were made at the time the fields were being fired, and what he said is a part of the *res gestæ*. It was a declaration accompanying an act, showing a wanton recklessness, knowing the danger of proceeding with his boat, but unwilling to lose a few hours for the wind to subside. New England Insurance Co. v. De Wolf, 8 Pick., 62; Hood v. Reeve, 3 Carr. & Payne, 532; 14 Eng. Com. Law Rep., 700; Curtis v. Ingham, 2 Vermont R., 289, and in the case of Thompson v. Chauvaux, 7 Martin, (new series, La. R.,) 331 and 333, a party defending an action of trespass, committed by another party, it was held that he thereby adopted his act, and that the same evidence which could be given against the trespasser could be given against the principal.

Now, in this case, we could have joined the masters as a party defendant, then there would be no doubt about the right to prove his declarations, and his not being joined cannot take away the right.

The corporation admit, by their answer, that they owned the boat, and that Stinson, the master, was in their employment at the time of the firing, and they come in and defend his acts.

It strikes me, what he said at the time he was doing the act, is the very best evidence that can be given. The defendants ought not to complain of what its own agent did and said upon the occasion.

Why did the defendants not call the master and let him explain, in his own manner, how the fire occurred, and all the cir-

cumstances attending it. See also the ship *Portland v. Executors of Philips*, 2 Sergt. & Rawle, 195, 202.

And in the case of *Carson v. Godley*, 26 Penn. R., 121, it was held that a party sued for injury done by reason of the insufficiency of a building he had rented, it was competent to show that other buildings, after being tested, had been found defective; so here we show that several fields were set on fire, and while being fired, the master stated that he knew the danger, but his owners would not justify his laying by.

In the language of the case last cited, "it showed a reckless perseverance in wrong-doing, which if the law cannot prevent, it will punish." See also, Story on Agency, § 134, and in § 136, the author says:

"So with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words." See also, 1 Gr. Ev., §§ 169, 170, 171 and 172, and in § 113 it is stated "that whenever what the agent did is admissible in evidence, it is competent to prove what he said about the act while he was doing it."

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover damages for the unskillful construction of the chimneys of the steamer *Swan*, and the negligence of the officers and servants of the company, in running the vessel upon the Sacramento River; in consequence of which the crop of grain belonging to plaintiff, on the bank of the stream, was set on fire and consumed by sparks issuing from the chimneys of the boat, in July, 1856. The plaintiff obtained a verdict and judgment in the Court below, and the defendant appealed.

The first point made by the counsel of defendant is that the Court erred in admitting evidence of the declarations of the master.

The declarations of the master were proved by the witness, McConoughay, who states, substantially, that he was a passenger upon the boat at the time; that he saw sparks and pieces of bark on fire, flying out of the chimneys and lighting on the grass, along the edge of the river on both banks; that the wind was blowing pretty hard at the time, and the fire immediately communicated to grass, grain, or anything that was near; and that he saw the fire entering into the grain of plaintiff, which was consumed. The plaintiff then asked the witness this question:

"What conversation was had, if any, by the officers of the boat in relation to the fire?"

The answer of the witness was:

"I heard the captain say that it was pretty hard on the

farmers to have their crops burnt up; and, if he thought the wind would lull in two or three hours, he would wait that time."

The question and answer were objected to by defendant; the objection was overruled, and the defendant excepted.

The declarations of an agent will bind the principal, if made during the continuance of the agency, and at the very time of the transaction. These declarations, when thus made, are considered as part of the *res gestæ*. (Story on Agency, §§ 134, 135; Greenl. E., § 113.)

The question to determine is, whether these declarations of the master did constitute a part of the *res gestæ*. In the case of *Innes v. the Steamer Senator*, (1 Cal. R., 461,) it was held by Bennett, Justice, that the declarations of the master, made the next morning *after* the collision, were no part of the *res gestæ*. So, in the case of *Mateer v. Brown* (1 Cal. R., 224,) it was held, that the declarations of a barkeeper were not binding upon his principal, when not made in the discharge of his duty. The defendant, in that case, was an innkeeper, and the plaintiff left a package of gold-dust with the barkeeper. The declarations were not made by the barkeeper at the time he received the deposit, but afterwards, when he took the bundle out of the closet to exhibit it to a stranger. This Court held that the act of exhibiting the package to a stranger was not done in the discharge of his duties as barkeeper, and his declarations were, therefore, but hearsay.

But the circumstances of the present case are different. It appears clearly from the testimony, that the fire was communicated from the chimneys of the steamer to the shore, at places below, opposite, and above the farm of the plaintiff. This occurred on the same day, and was but one continuous act; and the declarations of the master were made during this period, and while the boat was running under his command. We think these declarations were clearly admissible.

The second point made by the learned counsel of defendant is that the Court erred in overruling the motion for a nonsuit, there being no evidence of negligence on the part of the defendant.

The general rule upon this subject is laid down with great clearness by Cowen, (Cow. Trea., 384.) Speaking of the action of trespass on the case, he says:

"It lies in all cases of negligence in the use or disposition of one's property, or in clearing or improving it, by which another is injured; and the true question in such cases is whether the defendant or his servant has been guilty of negligence. For, it is a maxim in law, that a man is bound so to use his own as not to injure that which belongs to his neighbor."

In the case of *Radcliff's Executors v. Mayor and others*, of

Brooklyn, Bronson, C. J., has very ably reviewed the authorities upon this question. The learned Chief Justice has stated the true rule in these clear and concise words: "An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow." (4 Com., 200.)

The act must first be lawful; and second, it must be done in a proper manner to excuse a resulting injury.

The right of the defendant to navigate the Sacramento River with steamers, at all seasons of the year, cannot be questioned. The only question is whether there was negligence in exercising this lawful right.

We have been referred by the counsel of defendant to the cases of *Stewart v. Hawley*, (22 Barb., 619,) and *Rood v. New York and Erie Railroad Company*, (18 Barb., 80.) In the first case, the defendant set fire to his fallow, which had been previously burned over. Three days afterwards, the wind blew violently, and the fire communicated to an adjoining pasture, across which it passed to the plaintiff's premises, and burned his grass crops, etc. The Court held that the defendant was not liable. The fire was set in the dry season, in July, but in low swamp ground that had been burned over in the previous month of May. There was no brush near, and the fire was set on a day which looked likely for rain. The Court evidently laid much stress on the fact that the spreading of the fire was the consequence of the high wind, that arose three days afterwards. In the second case, it appeared that the plaintiff had sold to the Company a strip of land for the road, of the value of sixty dollars, for the sum of one thousand six hundred dollars; and the Court held, that it was "but fair to presume that, in giving his deed to the defendant, the plaintiff must have contemplated the risk of fire from engines running on the road." It was, therefore, held, that the defendant was only responsible to the plaintiff for ordinary care and diligence in the manner of using its road. It was also held, in that case, that authority to use a steam-engine upon the road was an authority to emit sparks therefrom; and, if the most approved means which science and skill have invented are applied to prevent sparks from causing injuries, the company is not liable in case damage is occasioned by fire communicated in that manner. The company in that case, had used the most extraordinary precautions, by furnishing their engines with the most approved spark-catchers, and by supplying the road with sectional superintendents, section-masters, and subordinate watchmen.

The counsel of plaintiff have referred to the case of *Haylett v. Philadelphia and Reading Railroad Company*. (23 Penn. State R., 373.) It was proved, in that case, that the road passed seventy-seven feet from the dwelling-house of the plaintiff, and that

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the house was set on fire by sparks from engines, passing at a time when the weather was very dry and windy, and the wind blowing strong across the road to plaintiff's house. Sparks were seen flying from the engines to the distance of fifty yards from the road, and fences and fields were set on fire about the same time, and at considerable distances from the road. The defendants proved that all their engines were in good order, and were all provided with good spark-catchers. On this state of facts, the Court below directed the jury to find for the defendant; but the Supreme Court reversed the judgment, holding that it was a question for the jury to determine, under the circumstances of that case, whether the injury was caused by the carelessness of the defendant's servants. In delivering the opinion of the Court, Lowry, J., said:

"How is it possible for the Court to say, as matter of law, how many sparks, or how many fires caused by them, it takes to prove carelessness? How can the law declare, except as a deduction from facts found, what are sufficient spark-catchers? When we find fires started by a locomotive, at distances from eighty to one hundred and fifty feet from the road, how can we say that that is no evidence of carelessness? It is a question of fact, whether the small sparks that escape through a good spark-catcher will ignite wood at such distance. We see wooden houses and lumber, and firewood and shingles standing all along the very edge of railroads without being burnt. How can we say that the happening of several fires all about the same time, along the line of road, is no evidence of carelessness?"

The Court further said that railroad companies "are bound to temper their care according to the circumstances of danger, and to exert more care when the property of others is in danger than when it is not."

The doctrine laid down in that case seems to be the true rule. The Company have the right to use steam-power in propelling cars on railroads, or boats on the rivers, but it must provide all reasonable precautions, to protect the property of others; and these means of prevention must not only be provided, but they must be properly used. Carelessness in either particular, accompanied with injury to any innocent party, will make the company liable. What facts and circumstances constitute evidence of carelessness, is a question of law for the Courts to determine. But what particular weight the jury will give to these facts and circumstances, is a matter for the jury.

In the present case it was informally, though substantially, alleged in the verified complaint, that the chimneys of the Swan were not furnished with spark-catchers. This allegation is not specifically denied in the answer, and must be taken as confessed. This admission is evidence of carelessness, and taken in connec-

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Marlow v. Marsh—People v. Wilson.

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tion with the other testimony, justified the Court in refusing a nonsuit, and amply sustains the verdict of the jury.

The third and fourth points of defendant have been substantially disposed of in our decision of the first and second.

Judgment affirmed.

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### MARLOW *et al.* v. MARSH *et al.*

Where amendments are made to a statement on appeal, a fair copy of the statement so amended should be made. Otherwise, the Supreme Court will not look into it.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

*Francis J. Dunn* for Appellants.

*McConnell & Niles, and A. A. Sargent,* for Respondents.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The papers, purporting to be a statement embodied in the transcript, consist of the draft prepared by the appellants, and the amendments proposed by the respondents, as they were originally served. The amendments agreed to by counsel should have been inserted in their proper place in the draft, and a fair copy of the whole made. In their separate form the draft and amendments do not constitute such a statement as we will look into on appeal.

Judgment affirmed.

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### PEOPLE v. WILSON.

Where the defendant was indicted for the crime of an "assault with a deadly weapon with the intent to inflict great bodily injury," and the jury found him "guilty of an assault with a deadly weapon:" Held, that it was error in the Court, to sentence the prisoner to two years in the State Prison.

APPEAL from the Court of Sessions of the County of Marin.

*W. Skichmore and T. H. Hanson* for Appellant.

*Thomas H. Williams, Attorney-General,* for Respondent.

*Bassett v. Haines.*

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

The defendant was indicted for an assault with a deadly weapon with intent to inflict great bodily injury. The defendant pleaded not guilty, and the jury found him "guilty of an assault with a deadly weapon." The Court sentenced the prisoner to two years' imprisonment in the State Prison, and the defendant appealed.

The offence of which the prisoner was found guilty by the jury, was not a felony, but a simple assault. This is conceded by the Attorney-General. (*The People v. Ida Vanard*, 6 Cal. Rep., 562.)

The Court, therefore, erred in assessing the punishment. (*Wood's Digest*, 335, § 49.)

The judgment is reversed, and the cause remanded for further proceedings.

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BASSETT *v.* HAINES.

A drew an order on B in favor of C for two hundred and six dollars and fifty cents; C presented the order to B, and he paid twenty-two dollars and fifty cents thereon, and the amount was receipted on the back of the order in the handwriting of B, and signed by C: *Held*, that this was not an acceptance.

The receipt is evidence that B owed only that sum and paid it, and would not imply acceptance of the whole amount.

APPEAL from the County Court of Sacramento County.

This was an action originally commenced in a Justice's Court to recover the sum of one hundred and eighty-four dollars, balance alleged to be due on an order given by Samuel C. Willse, and directed to the defendant Haines, and payable to plaintiff Bassett, for the sum of two hundred and six dollars and fifty cents. Plaintiff had judgment in the Justice's Court and the defendant appealed to the County Court, where the judgment was reversed, and a judgment for costs entered for defendant. Plaintiff then moved the County Court for a new trial, which motion was denied, and thereupon plaintiff appealed to this Court.

*Smith & Moody* for Appellant.

*Ralston, Wallace & Rayle*, for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

An order was drawn upon defendant in these words :

“Mr. Jas. W. Haines : Please pay to R. H. Bassett the sum of two hundred and six dollars and fifty cents.

Oblige yours,

“\$206 50.

SAM'L C. WILLSE.”

The order was presented by plaintiff to defendant, who paid twenty-two dollars and fifty cents, which was endorsed upon the order in defendant's handwriting, and signed by plaintiff, as follows :

“Received on the within order twenty-two dollars and fifty cents.

ROB'T H. BASSETT.

“SACRAMENTO CITY, Sept. 11, '56.”

The only question in the case is, whether this constitutes an acceptance “in writing, signed by the acceptor,” as required by the sixth section of the act relating to bills of exchange and promissory notes. (Wood's Digest, 72.)

We think it clear that this was no acceptance, either at common law or under the statute. Haines may have owed the drawer, Willse, the sum of twenty-two dollars and fifty cents, and no more. If so, the payment of that amount, and the endorsement of the same upon the paper, would not imply that he accepted and would pay the whole. The receipt is evidence that Haines owed only that sum and paid it. In all the instances cited by the counsel of plaintiff, the writing on the bill related to the entire amount. But the receipt only relates to the amount paid, and implies no acceptance of the order for the balance. Besides this, the receipt is not signed by the acceptor, within the meaning of the statute.

We think the County Court decided correctly in holding that there was no acceptance.

Judgment affirmed.

## ROBERTS &amp; CO. v. LANDECKER.

It is well settled that the proceedings by attachment are statutory and special, and must be strictly pursued, and when a party relies upon his attachment-lien as a remedy, he must strictly follow the provisions of the Attachment Law.

The provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee, and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step.

A plaintiff who has sued out an attachment and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property, against the garnishee.

If a statute gives a particular remedy in conferring a new right, then the particular remedy must be pursued; but under the Attachment Law a new right is created, but no practicable remedy is prescribed.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

The facts of this case appear in the opinion of the Court.

*Henry Meredith and J. R. McConnell* for Appellant.

Upon this appeal, as in the argument of the demurrer, all the averments of complaint must be taken as true. The fraudulent concealment and possession of the goods of Hertzinger, defendant in the former suits of plaintiffs, at the time of garnishment, and the subsequent fraudulent sale by Landecker and conversion of proceeds to his own use, constitute a sufficient foundation for complaint on the part of plaintiffs. If anything was wanting under the general law of the land to make out a legal and equitable claim in favor of plaintiffs against Landecker, the statute supplied the defect by declaring under the circumstances a distinct liability. Practice Act, § 127.

To have called up Landecker and subjected him to the examination, under oath, before the Court, with the hope of eliciting an answer on which judgment could have been rendered against him for the value of the goods fraudulently disposed of, would have been a vain and senseless endeavor.

Such is the practice in ordinary cases of garnishment, where there is no ingredient of fraud; and such practice is not specially prescribed by the sections of the act which appertain to attachments, but is drawn by analogy from those provisions concerning proceedings supplementary to execution. It is a safe and convenient practice where the plaintiff in attachment is not baffled and defeated by the frauds of the garnishee. To drive a plaintiff, however, to such a proceeding, and confine him for his remedy to such, where the acts of the garnishee are fraudulent

and villainous, is to oblige a vain thing, and require a mock pursuit of an asserted right. *Lex non cogit ad vana*.

The liability of defendant, under the circumstances of the case as averred by plaintiffs, being created or declared by statute, (Prac. Act, § 127,) if it did not exist before, the general law would furnish a remedy. *Ubi jus ribi remedium* is a maxim of our law, and although the circumstances giving rise to the right and correlative obligation are new and without a precedent, this principle of law affords a form of action and remedy. Broom's Legal Maxims, 146-7-8, etc.

Where the statute giving the right is silent as to the remedy, or describes one wholly inadequate to meet the peculiar circumstances of the case, the common law remedies and forms may be adopted. 1 Chitty Plead., 143, et seq.

In cases of garnishment arising under proceedings supplementary to execution, (§§ 241-2 of Prac. Act,) the statute authorizes a given mode of procedure, but those sections of the law which, under the arrangement adopted of its different parts, concerning garnishments under the writ of attachment (§§ 126, '7, '8, etc.,) prescribes no method or no adequate means whereby a plaintiff's rights against a fraudulent garnishee may be enforced. Under this silence of the statute, we must resort to the analogies of the common law.

*Buckner, Hill & Stewart*, for Respondent.

The first point involved herein is, are attachments remedies given by statute? For the principle is well established that when a statute gives a right and remedy, the statute remedy must be followed. See 1 Chitty's Plead., 112 and 143; 3 Mass. R., 307; 5 Ib., 514.

Our own Supreme Court has decided a number of times that attachments are the creation of statutes, and must be strictly pursued. 2 Cal. R., 17; *Thornburg v. Hand*, 7 Cal. R., 554; *Hackett et al. v. Adams & Co.*, 7 Cal. R., 187; 2 Tucker's Com., 242.

The statute provides a remedy to fix the liability of the garnishee, and that remedy must be strictly followed.

By §§ 127 and 128 of the Practice Act, this liability is granted and the mode of fixing defined, viz.: by requiring attendance before referee, Court, or Judge.

The liability of garnishee is not fully determined, nor has plaintiff any cause of action against him until his answer is received.

The proceeding, by attachment, is a mere auxiliary remedy, designed to aid plaintiff in the collection of his demand by execution.

The levy of the writ of attachment, does not change the title of the property levied upon, but only acts as a mortgage or lien

thereon, and holds the same as security for any judgment that may be rendered; and our statute contemplates this idea in requiring that execution shall be levied, first upon the property attached, and attached property be sold for satisfaction of judgment. § 132, Prac. Act.

By § 120, Practice Act, it is expressly declared that the property may be attached as security.

The attachment only acts as security until the rendition of judgment, and levy of execution, and it is under the execution that proceedings must be taken to render garnishee liable. §§ 241, 242, Prac. Act.

There is no averment in this complaint that the attached property was ever levied upon, or sought after under execution, or demand ever made therefor by the proper officer; nor is there any averment of defendants being called upon to answer under either attachment or execution.

The complaint shows that execution was issued and returned, but it does not show that defendant was ever summoned to answer, or did answer as to liability under oath, or exhibit his claim.

Where an adverse interest is claimed by the person alleged to have property of the judgment-debtor or indebted to him, the Court or Judge may, by order, authorize an action to be brought against such claimant. § 244.

There is no averment in this complaint that such an order was ever made or granted, though adverse interest is shown as being claimed.

The statute requires that when debts and credits are attached, officers shall request a memorandum, stating amount and description of each; and if garnishee refuses to give such memorandum, return refusal on the writ. § 129, Prac. Act.

Here, then, is no averment of such demand or refusal, nor even of the return of the writ.

The principle of the law is well settled and established, that the plaintiff, in attachment, does not acquire any property in the attached property, until after sale, on execution, upon judgment rendered in the action. *Drake on Attachment*, § 219; *Austin v. Wade*, 2 Pennington, 997; *Blake v. Shaw*, 7 Mass., 505.

The averments in the complaint show that plaintiffs claim this property, or the value thereof, solely on the ground of having garnisheed defendant therefor, and no other ground whatever.

If, therefore, plaintiffs have no such property in the goods, etc., under attachment, as to enable them to maintain an action therefor, can an action be maintained to recover the value therefor on alleged conversion.

This action is in the nature of trover, and to sustain it, plaintiff must aver and show the actual possession or the right to the

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immediate possession of the property. 1 Chitty Pleadings, 152; 2 Tucker's Com., 86, *et seq.*

Here there is no averment as to possession or right of possession.

In all proceedings under attachment, the garnishee is entitled to have his answer taken, and such answer and the facts therein stated are to be taken as true, unless controverted by plaintiffs. Drake on Att., 669, *et seq.*

This controversion and answer raises the issue which must be tried before liability can be ascertained or fixed. 3 Cal., 253; Wilhelm v. Riley, 5 S. & R., 137.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The plaintiffs brought two suits by attachment against John Hertzinger, and served copies of the writs upon the defendant Landecker, with a notice that all debts owing by him to Hertzinger, and all other personal property in his possession, or under his control, belonging to the defendant in the attachment-suits, were attached in pursuance of said writs. The plaintiffs pursued these suits against Hertzinger to judgments, upon which executions were issued, and returned no property found. The plaintiffs then brought this suit against Landecker, and alleged in their complaint that at the time of the garnishment the defendant had in his possession goods of Hertzinger, of the value of five thousand dollars, which goods he afterwards fraudulently disposed of, and converted the proceeds to his own use. To this complaint the defendant demurred, the demurrer was sustained, and the plaintiffs appealed.

The facts stated in the complaint being taken as true, the only question is whether they can constitute a cause of action in this form. The defendant was not brought before the Court or Judge under the provisions of the 128th section of the Code; and his counsel take the ground that no suit can be brought against him until he is examined, under oath, respecting the alleged property of the defendant in the two attachment-suits; and that after such examination, had such been had, the plaintiffs could only proceed under sections 241-2-3-4 of the Code, in reference to proceedings supplementary to the execution.

It is well settled that proceedings by attachment are statutory and special, and must be strictly pursued. So far, then, as the Attachment Law affords the plaintiffs a remedy, they were bound to pursue it. Having once invoked the stringent provisions in reference to attachments, the plaintiffs could not resort to other remedies to the prejudice of defendant, so long as they relied upon their attachment-lien.

But, while the provisions of the code in reference to this rem-

edy must be strictly construed and followed, they should be fairly interpreted, so as to give them a consistent and efficient operation in proper cases.

The 127th section makes the garnishee liable to the plaintiff in the attachment-suit for the amount of such property, unless the same be delivered up or transferred to the sheriff. Under the provisions of this section, the garnishee may protect himself from all further liability by delivering the property to the sheriff. This is a right which may be voluntarily exercised by the garnishee. If he delivers to the sheriff any property, he cannot be made further responsible for the property delivered. But the provisions of the 128th section were intended for the security of the plaintiff, who may cause the garnishee to appear and answer under oath; and the Court or Judge may require the delivery of the property to the sheriff. The plaintiff may not be willing to trust to the personal responsibility of the garnishee, pending the attachment proceedings, and may have the best reasons for demanding the delivery of the property to the sheriff. We cannot see, however, that this section was intended to confer a privilege upon the garnishee. The privilege of examination on oath is for the security of the plaintiff and not of the garnishee. If the statement of the garnishee constituted the measure and limit of his liability, then he would have the right to insist upon it, as a condition precedent to any suit against him.

If these views be correct, it follows that the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath; and that the liability of the garnishee will not be affected by the failure of the plaintiff to take such a step. If he is willing to rely upon the responsibility of the garnishee and upon other testimony to prove the facts as to the property, he has the right to do so, without releasing the garnishee.

The liability of Landecker for the value of the property under his control could not have been destroyed by the failure of the plaintiffs to examine him on oath: the question arises, how is that liability to be enforced? The counsel of the defendant insist that it can only be done under the provisions of the Code in reference to proceedings supplementary to the execution. The 241st section provides that after the issuing or return of an execution, any person owing the defendant in the execution, or having property of his in possession, may be compelled, by order, to appear before the Judge or referee, and answer concerning the same. If the person claim the property, the Court or Judge may authorize the plaintiff in the execution to bring a suit against the claimant. (§ 244.)

There is nothing in the chapter concerning attachments that refers to these sections, and nothing in the proceedings supplementary to the execution that properly applies to the peculiar circumstances of this case. The liability of the defendant com-

menced when the writs were served, and the measure of his responsibility depends upon the amount of property belonging to Hertzinger, and then in his possession, or under his control. The plaintiffs, under the state of the case made by the complaint, are not seeking to enforce their lien upon the property itself, as that cannot be reached, having been disposed of to others. They are not asking a discovery of the property and the subjection of it to their debt under a sheriff's sale. They sue upon a statutory liability for the value of the property.

The proceedings supplementary to the execution have another object in view. They seek to subject the property itself to sale under execution, or the debt to collection. Under the provisions of the two hundred and forty-first section, the plaintiff must satisfy the Judge, by affidavit or otherwise, that the person has property of the execution-debtor or is indebted to him. The plaintiffs in this case could not make affidavit, at the time they issued their execution, that the garnishee then had property in his hands belonging to the execution-debtor; because before that time the property had been disposed of to others. Nor could they state that Landecker was then indebted to Hertzinger, for the reason that Landecker's liability, under section one hundred and twenty-seven, was direct to the plaintiffs. The chapter relating to the writ of attachment provided no specific remedy; and the remedy by proceedings supplementary could not reach the peculiar state of the case.

If it be true, as alleged, that defendant fraudulently disposed of the goods, the plaintiffs could have no object in his examination on oath. They did not want his testimony, and could not expect to obtain any admission against him. The liability of defendant being direct to plaintiffs for the value of the goods, the defendant had no right to give his testimony, unless required by the plaintiffs. The law did not require the plaintiffs to do an idle thing.

If a statute give a particular remedy in conferring a new right, then the particular remedy must be pursued. (1 Ch. Plea., 142.) But, in this case, a new right was created, but no practicable remedy prescribed. This being so, a suit in the form adopted by the plaintiffs is the most direct and concise. Under it the defendant can have ample opportunity to make his defence. If the facts turn out upon the trial to be true, as alleged, then he should be liable to plaintiffs for the value of the property.

Judgment reversed, and cause remanded for further proceedings.

GARNER v. MARSHALL *et al.*

The general rule as to the effect of a verdict upon defects in pleading, is, that wherever facts are not expressly stated which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the Court, there the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment.

It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action.

Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises.

It will only lie against a party out of possession claiming title when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, such as enclosure, cultivation, and the like.

The thirteenth section of the Practice Act, which provides that any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved, has no application to the action of ejectment. It refers to cases in equity.

4. APPEAL from the District Court of the Fifth Judicial District, County of Tuolumne.

This was an action of ejectment, to recover possession of a tract of land. The averments of the complaint appear in the opinion of the Court. At the close of the plaintiff's testimony, the defendants moved the Court "for a nonsuit as to defendants Sotor and Marshall, on the ground that no proof had been given that either of them were in the actual occupation of the premises at the time of the commencement of the suit." There was no proof of possession on the part of these defendants, but the evidence established the fact that the defendant Spear was in the occupation of the premises at the commencement of the action. The Court denied the motion, and the defendants excepted. At the close of the testimony, the defendants' counsel asked the Court to instruct the jury, "That if they believed, from the evidence, that the premises were actually occupied at the time of suit brought, by defendant Spear, and that defendants Sotor and Marshall, at the time of bringing suit, were not in actual occupation of the premises, then said Sotor and Marshall were entitled to a verdict."

The Court gave this instruction, with this qualification, viz.: "That if they believed that defendants Sotor and Marshall made any claim to the premises, then they were liable in this action." To the giving of which defendants excepted. Plaintiffs had judgment, and defendants appealed.

*Barber for Appellants.*

1. The Court erred in charging the jury, "That if the jury be-

lieved, from the evidence, that defendants Sotor and Marshall made any claim to the premises, then they were liable in this action."

There is no evidence whatever that Sotor ever did make any claim to the premises.

Neither Sotor nor Marshall, so far as the evidence shows, ever lived on the premises; and at the time of bringing suit, the premises were in the sole actual occupation and possession of defendant Spear. 6 Wendell, 666; 12 Wendell, 558; 5 Hill, 48.

2. The Court erred in refusing a nonsuit on behalf of defendants Sotor and Marshall, as requested by defendants' counsel.

Neither of them were in possession of the premises at the time of bringing suit, and should have been discharged.

That Marshall claimed the premises (being out of possession) makes no difference.

The Practice Act, section two hundred and fifty-four, provides a mode of determining conflicting claims to real estate, but not by an action of ejectment. Ejectment is a possessory action, and unless defendant be in possession at the time of bringing suit, he is entitled to be discharged.

#### *L. Quint for Respondent.*

The nonsuit was properly refused; the answer was a general denial, and the whole defence made by Marshall and Sotor, who claimed title. *Winans et al. v. Christy et al.*, 4 Cal. R., 70.

The doctrine sought to be established in the case of *Mesick v. Sunderland*, that possession could not be given in evidence as constructive notice of title, has been entirely overthrown. In the case of *Bird v. Denison*, 7 Cal. R., the Court says: "From the nature of the subject, there can be no informal rule laid down by the Courts—the facts and circumstances of each particular case must determine it."

FIELD, J.—The complaint in this action is very defective; it does not allege title or prior possession in the plaintiff or those through whom he claims, and it contains no direct averment of any entry by the defendants, or occupation by them at the commencement of the action. It simply sets out the execution of a mortgage upon the premises by one Johnson, and the proceedings in a foreclosure-suit thereon, the entry of the decree, the sale thereunder and purchase by the plaintiff, to whom a Sheriff's deed was given, without any mention of title or possession in the mortgagor, and concludes with an averment of demand upon the defendants for the possession, and their refusal to deliver the same. The defects would have been fatal on demurrer, and we are not entirely satisfied that they are cured by the verdict. The general rule is, that wherever facts are not expressly stated, which are so essential to a recovery, that, without proof of them

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on the trial, a verdict could not have been rendered under the direction of the Court, there the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment. (Stephens on Pleading, 149; *Jackson v. Pesked*, 1 M. and S., 234.) The decision of the question is not essential to the determination of the appeal, as the judgment below must be reversed upon another point.

The evidence produced on the trial established the fact that the defendant Spear was in the occupation of the premises at the commencement of the action, and that the other defendants only claimed title to them under a constable's sale. No attempt was made to prove possession by Marshall and Sotor, and the Court below erred in refusing a nonsuit as to them, and in qualifying the instruction requested as to their occupation of the premises. Mere assertion of title in conversation with the plaintiff's witness could not render them liable in the action. Ejectment is a possessory action and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. It will only lie against a party out of possession claiming title when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, such as enclosure, cultivation, and the like. The thirteenth section of the Practice Act, which provides that any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved, has no application to the action of ejectment. It refers to cases in equity where all persons, whose rights may be affected, are to be brought in as parties, in order that a complete decree may be rendered, (2 Greenl. Ev., 304; *Jackson v. Ives*, 9 Cowen, 661; *Van Horn v. Everson*, 13 Barb., 532; *Champlain and St. Lawrence Railroad Company v. Valentine*, 19 Barb., 485.)

Judgment reversed, and cause remanded.

TERRY, C. J.—I concur in the judgment, for the reasons stated in the opinion, and for the additional reason that the complaint does not state facts sufficient to constitute a cause of action.

BURNETT, J.—I concur in the judgment, but am not now prepared to say that the thirteenth section of the Code refers alone to cases in equity. The plaintiff should have failed as against the defendants Marshall and Sotor, for the reason that neither they nor plaintiff had possession. There being no possession, either by the plaintiff or these defendants, the plaintiff could not sustain this action as against them. The suit, so far as they were

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concerned, was a bill to quiet the title, which could not be brought by a party out of possession. (Code, section 254.)

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### BACON v. SCANNELL *et al.*

The cases of *Fitzgerald and Brown v. Gorham*, (4 Cal. R., 289,) *Stewart v. Scannell*, (8 Cal. R., 80,) and *Vance v. Boynton*, (8 Cal. R., 554,) affirmed.

The change of possession of the property sold, must be continued. The statute does not fix any limits when this change may cease, and if Courts could put limits to it, they could do away with the clear language of the law.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

In 1851, the plaintiff Bacon, and E. L. Boardman, commenced business in the city of San Francisco, as hardware merchants, under the style of Boardman, Bacon & Co. The business was continued until the twenty-fourth day of May, 1856, at which time the partnership was dissolved, and Bacon went out of the business. From this time to the twenty-first of June, 1856, the business was carried on by Boardman, he having exclusive possession of the goods and business. From the twenty-fourth of May to the twenty-first of June, 1856, there was no sign on the house. On the twenty-first day of June, 1856, Boardman sold out the goods to Bacon and delivered the possession thereof, and a day or two thereafter the name of R. H. Bacon was put up over the door, and business was carried on in his name, he employing the necessary help and paying therefor. On the twenty-third of July, 1856, one of Bacon's clerks leaving, he employed Boardman as clerk, who entered and took charge of the business for Bacon—Bacon in the meantime acting as book-keeper for another house, but returning at intervals to look after the business, and take the money arising from the sales.

Boardman being indebted to the defendants, on the twelfth day of August, 1856, they sued out an attachment against him and seized the goods in the store as the property of Boardman. Soon after the levy of the attachment, Bacon gave the sheriff notice that he claimed the goods as his property. A trial of the right of property was had before a sheriff's jury, and Bacon had the verdict. The defendants, Tallant & Wilde, and Griffing, indemnified the sheriff, and the property was not released. Subsequently defendants recovered judgment in the attachment-suit against Boardman, and the goods were sold on execution issued on said judgment. Thereupon the plaintiff brought this suit to recover the value of the goods.

At the trial, the Court below, at the request of defendants' counsel, instructed the jury as follows: "That if they believed the testimony of the plaintiff's witness, Boardman, that he returned to the charge of the goods in question on the twenty-third of July, 1856, as testified to by him, that under the Statute of Frauds of this State, it was conclusive evidence of fraud, and there was not such a continued change of possession of the goods as to take the case out of the statute, and if the sale was fraudulent against creditors, the plaintiff could not recover."

To this instruction plaintiff's counsel excepted. Defendants had judgment. Plaintiff moved for a new trial, which motion was denied, and plaintiff appealed.

*C. H. S. Williams* for Appellant.

The rule laid down by the District Court, is in substance and legal effect, this:

That upon a fair and *bona fide* sale of personal property, for a full consideration paid, where the vendor delivered possession, and goes away to another country, without any expectation by either party that he should ever have anything further to do with the property—his subsequent employment, (at however remote a period,) to assist in the sale of the property, is conclusive evidence of fraud.

We submit that this is erroneous; and that the true rule is that adopted by the Courts of Kentucky, New Hampshire, Massachusetts, Vermont, and those other States in which the common law is held to be quite as rigid as the statute of this State, and substantially the same in terms, to wit: That the continuance of possession need not be forever; but if it is so long, and so public and notorious as to give notice to those dealing with the vendor, and without any understanding or agreement, that the vendor should resume the possession, it is sufficient "continuance of possession."

In other words, it is sufficient "continuance of possession," if it be, (in the language of Justice Robinson, in *Preckenridge v. Anderson*, 3 J. J. Marsh. R., 714,) so long and in such a manner "as to show that the delivery was not merely formal and colorable." See *Clark v. Moore*, 10 N. H. R., 236; *French v. Hall*, 9 ib., 134, 146; 6 Watts & Sergt. Pa., 94; 13 Sergt. & Rawle, 128, 131; *Deney v. Thrall*, 13 Vt., 281; *Farnsworth v. Shepard*, 6 Vt. R., 521; *Wilson v. Hooper*, 12 Vt. R., 653; 3 Barr, 442.

*Whitcomb, Pringle & Felton*, for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This is a case where the vendor of a stock of goods was employed by the purchaser as a clerk to sell them. The goods

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were attached as the property of the clerk, by his creditors, and sold by defendant Scannell as sheriff. This suit was brought to recover the value of the goods; and the Court below instructed the jury that if they believed the testimony of plaintiff's witness (the clerk,) they must find for the defendants.

The instruction of the Court was correct. This case falls within the principle settled in the cases of Fitzgerald and Brown v. Gorham, (4 Cal. R., 289; Stewart v. Scannell, 8 Cal., 80, and Vance v. Boynton, October, 1857.) The present case only differs from the first cited above in the fact that the vendor in that case was immediately employed as a clerk to sell the goods, while in this he was away from the store about one month, and was then employed. But this difference in the time of employment constitutes no difference in the actual principle. The statute requires not only an actual but a *continued* change of possession of *the things* sold or assigned. The change of possession must be continued; and the statute does not fix any limits when this change may cease. The language of the statute is very clear and explicit. If we could put any limits to it, we could do away with the clear language of the law. The rule is one expressly created by the statute, and not by the decisions of the Courts; and as the statute puts no limit to the duration of this "continued change of possession," we can make none. If the rule be oppressive, the remedy must be found with the Legislature.

Judgment affirmed.

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PEOPLE v. STEVENTON.

An indictment for murder which charges, at a time and place mentioned, defendant feloniously assaulted, cut and stabbed the deceased, and inflicted on him one mortal wound, of which mortal wound he on the same day died, is sufficient. A description of the weapon used is not material. An objection that the indictment does not state the length and depth of the wound, nor in what part of the body it was inflicted, goes to the form rather than the substance of the indictment.

The facts necessary to constitute the crime of murder are, that a wound was inflicted with a felonious intent, that the wound was mortal, and that death ensued from the effects of the wound within a year and a day.

APPEAL from the District Court of the Fifth Judicial District, County of Amador.

The defendant and one William Leversage, were indicted for the crime of murder. The allegation in the indictment of the offence is as follows:

"The said William Leversage and Samuel Steventon, on the thirtieth day of November, A. D. 1857, at the county of Amador and State of California, in and upon one Abraham Hostetter,

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feloniously, willfully, and of their malice aforethought, did make an assault, and did then and there feloniously, willfully, and of their malice aforethought, cut, stab, and wound him, the said Abraham Hostetter; and did then and there give him, the said Abraham Hostetter, one mortal wound, of which said mortal wound the said Abraham Hostetter afterwards, on the thirtieth day of November, A. D. 1857, did die. So the grand jurors aforesaid, upon their oaths, do say that William Leversage and Samuel Steventon, on the thirtieth day of November, A. D. 1857, at the county of Amador and State of California, feloniously, willfully, and of their malice aforethought, did kill and murder the said Abraham Hostetter," etc.

To this indictment the defendant Steventon, by his counsel, demurred on the following grounds:

1. It does not substantially conform to the requirements of sections two hundred and thirty-seven and two hundred and thirty-eight of the Act to Regulate Proceedings in Criminal Cases.

2. The indictment is not direct and certain, as regards the circumstances of the offence charged.

3. The facts stated do not constitute a public offence.

The demurrer was overruled, and the defendant, Steventon, tried and found guilty of murder in the first degree, and judgment was entered accordingly. Steventon's counsel then moved in arrest of judgment, which motion was also denied. Thereupon the defendant appealed to this Court.

*Smith & Hardy* for Appellant.

The Court erred in overruling the defendant's demurrer.

1. The indictment does not state or describe the weapon with which the defendant cut the deceased.

2. The indictment does not state the part of the body upon which the wounds were inflicted.

3. The indictment does not show that the deceased died of the wounds so inflicted in this State, nor does it show when he did die.

The Court erred in overruling the motion made by defendant in arrest of judgment. See *The People v. Jacinto Arro*, 6 Cal., 207; *The People v. Cox*, 8 Cal., Jan. Term; *The People v. Wallace*, 8 Cal., Jan. Term.

*Attorney-General* for Respondent.

TERRY, C. J., delivered the opinion of the Court—FIELD J., concurring.

The objections to the indictment are not sustained by the authorities cited.

It is alleged that the defendant at a time and place mentioned, feloniously assaulted, cut, and stabbed the deceased, and inflicted

on him one mortal wound, of which mortal wound, he on the same day died; this, we think, is a sufficient statement of the facts constituting the offence.

The omission to describe the weapon used is not material. Though it is usual to name some weapon, the prosecution is never held to prove the killing by the weapon charged. It is sufficient if it is proven to have been done with any other weapon capable of producing death, in the same manner as the instrument named in the indictment. (Wharton, 412.)

In New York, the rule has been carried further. In *The People v. Colt*, (3 Hill, 436,) under an indictment charging the murder to have been committed by cutting and stabbing with some instrument to the jurors unknown, proof was admitted, tending to show that the death was caused by a pistol-shot.

The objection that the indictment does not state the length and depth of the wound, nor in what part of the body it was inflicted, goes to the form rather than the substance of the indictment. Formerly, at common law, such a description was held to be necessary, though it was not necessary that it should be proven as charged, but in later cases this rule has been changed.

In the case of *Rix v. Masley*, (2 British C. C., 102,) a motion in arrest of judgment was made, on the ground that the indictment contained no sufficient description of the wounds from the effect of which it was said the death ensued.

Counsel contended that it was necessary to describe the particular parts of the body on which the wounds are alleged to be, and the facts should, according to ancient forms, be so stated that you might place your finger on the part of the body where the wounds are described to be, and that this was still requisite, though a conviction may take place on evidence varying from it. The case was reserved for argument before all the Judges, and it was held, that "as common sense did not require the statement of these particulars, and as the statement, if introduced, need not be proven, it was unnecessary." This doctrine was reaffirmed in the case of *Rex v. Tomlinson*, (25 Eng. Com. Law R., 442.)

The "facts necessary to constitute the crime" of murder are, that a wound is inflicted with a felonious intent, that it is mortal, and that death ensued from the effects of the wound within a year and a day after its infliction. (See *People v. Arro*, 7 Cal.)

Judgment affirmed, and the Court below is directed to fix a day to carry its sentence into execution.

TARTAR v. FINCH *et al.*

A. kept a ferry across the Sacramento River under a license which had expired. Having lost his boat, he contracted with B. to furnish, rig, and run another, under the license to A., which he was to renew, until the profits should repay B.'s advances, with interest. A. neglected to renew his license. B., after waiting four months, applied for and obtained a license in his own name, and ran a ferry under the same. A. brought suit against B. for an accounting and return of ferry. *Held*, that A. had failed to carry out his agreement, and could not recover.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

A statement of the facts appears in the opinion of the Court.

*Heydenfeldt* for Appellant.

*P. L. Edwards* for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The facts necessary to illustrate the opinion were substantially these: Newell Hall kept a ferry across the Sacramento River, at Tehama, from October, 1851, up to February, 1854, under a license from Butte county. His license expired on the eighth day of October, 1853, and his ferry-boat was swept away by a flood in February, 1854. Being unable to build another boat, it was agreed, between Hall and defendants, in the latter part of March, 1854, that defendants should furnish the means and build a ferry-boat, and keep the ferry under the license to Hall; and, after deducting from the amounts received for ferriage a sufficient sum to cover the cost of the boat, and interest, and expenses, the defendants were to return the boat and ferry to Hall. On the seventh day of August, 1854, Hall made application for license to keep the ferry, which application was rejected. On the sixth day of December, 1854, Finch made application for a license, which was granted for the period of one year. The defendants, Chard and Finch, have kept the ferry from the date of the agreement between Hall and defendants up to the commencement of this suit. Hall assigned his interest in the ferry to Crosby, and he to the plaintiff. This suit was brought for an accounting and a return of the ferry. The defendants had judgment in the Court below, and the plaintiff appealed.

We think the decree of the Chancellor was correct. The complaint alleges that the defendants were to renew the license in the name of Hall. This is denied in the answer, and is not sustained by the proof. The evidence of the plaintiff shows that the defendants were to keep the ferry, under the license to Hall.

At the time this agreement was made, Hall had no license. Whether the defendants knew that fact, or supposed he had a license, is not shown by the proof. But from the proof, it seems clear that Hall was to attend to the renewal of the license. This he attempted, but the Court refused to grant him the license, for want of proof of notice having been given. It appears that Hall failed to obtain a license, from his own negligence, and from no fault of the defendants. Finch then waited four months for Hall or his assignee to procure the license. But no further effort was made by Hall or Crosby. In the meantime, defendants were violating the law at their own risk, by keeping a ferry without a license. From the testimony, it appears most probable that Hall did not intend to make any further effort to procure the license. He sold to Crosby the sixth of November, 1854, for one hundred dollars. At this time, the ferry was largely indebted to defendants for their advances. The prospect of paying this amount, with two and one-half per cent. interest per month, and the expenses of keeping the ferry, was certainly not very good. After the interest of Hall was assigned to Crosby, the latter made no effort to procure a license. The failure to carry out the agreement was on the part of Hall and Crosby. The defendants waited as long as they should have done, under the circumstances.

Decree affirmed.

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### MEERHOLZ v. SESSIONS.

Where the statement embodied in the record is filed on a motion for a new trial, this Court will only examine the action of the Court below in denying the motion. This Court will not hear any objections to an order entered in the Court below, by consent of parties.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

*H. S. Love* for Appellant.

*McDougall & Sharp* for Respondent.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The statement embodied in the record was filed on the motion for a new trial, and we can only examine the action of the Court

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Tissot v. Darling.

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below in denying the motion. As the order was entered by consent, we cannot hear any objection to it on appeal.

Judgment affirmed, with twenty per cent. damages.

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### TISSOT AND WIFE v. DARLING *et al.*

An averment in the complaint, in a suit on an appeal-bond, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The non-payment of the judgment can be shown without issuing an execution.

The objection that an undertaking on appeal was not signed by the principal, has been decided by this Court in the case of *Curtis v. Richards & Vantine*, January Term 1858.

Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterwards defendants execute an undertaking on appeal to the husband and wife, and suit is afterwards brought on the undertaking, in the name of the husband and wife: *Held*, that the defendants are concluded by the acts of appellant, and that the wife is properly joined in the suit on the undertaking.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action instituted by plaintiffs against William A. Darling and P. Warren Van Winkle, sureties in an undertaking on appeal, to recover the amount of the judgment from which the appeal was taken. The undertaking is entitled "In the case of Paul Tissot and Natividad de Haro, his wife, v. Samuel R. Throckmorton." After reciting the judgment and the appeal therefrom, etc., it proceeds as follows:

"And whereas the appellant is desirous of staying the execution of the said judgment and order so appealed from, we do further, in the consideration thereof and of the premises, jointly and severally, undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of five thousand three hundred dollars, (\$5,300, being double the amount named in the said judgment,) that if the said judgment and order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of said amount, as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal."

The complaint alleges that the judgment and order appealed from were affirmed by the Supreme Court, and that a *remittitur* was duly issued and filed in the Court below, that payment of the judgment was demanded of Throckmorton, that he neglected and refused to pay the same, or any part thereof, and that the amount of the judgment is due and unpaid, and that plaintiff:

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are the legal owners thereof, and concludes with a prayer for judgment. The original judgment against Throckmorton was obtained on a note given to Tissot and wife for the purchase of certain real estate which she inherited from her father before her marriage.

The defendants demurred to the complaint on three grounds:

1. That the plaintiffs have not the legal capacity to sue.

2. That there is a defect of parties plaintiff.

3. That the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was overruled and the defendants answered, admitting the execution of the undertaking, but alleging payment of the judgment. The defence on appeal, is the same as that set up in the demurrer.

Plaintiffs had judgment, and defendants appealed.

*D. W. Perley* for Appellants.

The question then is, does the complaint state a good cause of action.

The appellants contend it does not, for the following reasons:

1. The action is on an appeal-bond, and there is no averment that any execution was ever issued on the judgment appealed from.

By section three hundred and forty-eight of the Practice Act it clearly appears that the undertaking of the sureties is only collateral. They undertake, not that they will pay the judgment in case it be affirmed, but that the appellants will pay it. The judgment-creditor must exercise ordinary diligence, at least, to collect the judgment from the principal before he has a right of action against the sureties.

This diligence could be only shown by an execution issued and a return of *nulla bona*; without showing that, he does not show a cause of action.

2. The undertaking is defective and void, because it was not signed by the appellants, and there can be no right of action upon it against the sureties.

The language of the three hundred and forty-eighth section of the Practice Act, above cited, requires that the bond or undertaking shall be executed on the part of the appellants, with two sureties, etc. The sound and fair construction of this, is, that the appellant himself shall execute the bond as principal, with two other persons as sureties.

That was not done in this case, the sureties alone executed it, and there is no obligation on the part of appellants themselves, and they are not bound.

Suppose the sureties have to pay the judgment, they ought to have an action over against the principal, but that they could not have in this undertaking, for he is no party to it.

By the civil law, from which most of the common law doctrines in regard to sureties is derived, it is laid down, that from the very nature of the obligation of a surety there must necessarily be an obligation on the part of him for whom the surety undertakes.

"If there be no obligation the surety is not bound." Burge on Suretyship, p. 6.

In Mississippi the statute in respect to appeal-bonds was in the following words:

"Any person who may conceive himself aggrieved by any judgment, order, or decision, of the Court of Probate, may have the liberty of appealing to the High Court of Errors and Appeals, upon the appellant giving bond, with good and sufficient security, approved of by said Court, in such sum as they shall direct, to the Judge thereof."

This statute, in the point now under consideration, differs but little from the language of our statute. There is really no difference between "the appellant giving bond with good security," and "an undertaking executed on the part of the appellant with good sureties," etc.

But in Mississippi it was held, that a bond given by the sureties alone, was not the undertaking required by the statute, and was insufficient to sustain an appeal. *Porter v. Grisham*, 3 How., 75; *Hardway v. Biles*, 1 S. and M., 675.

See the following authorities on the same point:

An appeal-bond, executed by a surety only, without a principal, is not sufficient in law. *Day v. Pickett*, 4 Munf., 104; *Miller v. Blannerhasset*, 5 Munf., 197; *Rootes v. Holliday*, 4 Munf., 323.

The same doctrine has been held in New York.

The bond must be executed by some of the parties appealing. *Ex parte Anna Brooks*, 7 Cowen, 428.

The complaint is also defective in another respect.

It appears that one of the plaintiffs is a married woman, and there is no averment that the action in any way concerns her separate estate. In fact, there is nothing whatever alleged to show that she is either a proper or necessary party to the action.

But this point will be more fully discussed under the second and third grounds of demurrer, which will be considered together.

This is an action brought by husband and wife and can only be sustained on the supposition that the wife is beneficially interested in the subject-matter of the action.

If she is not thus interested, or if it shall appear that the whole legal interest in the subject-matter of the controversy is vested in the husband, then the wife was irregularly and improperly joined, and the demurrer should have been sustained.

It is true the undertaking was executed to the husband and wife, but this alone does not vest any interest in her, whatever. If the matter did not arise out of, or concern her separate property, she has no right of action, whatever, in the instrument. The husband alone could sue.

To show this clearly, it is necessary to examine the rights of husband and wife, and the disability of the wife, both by the common law, and also under our statutes.

By the common law, marriage was an absolute gift to the husband of all the wife's personal chattels, in possession, and a conditional gift of all her choses in action.

The condition was, that he should reduce them into possession during *coverture*, otherwise they would survive to the wife.

During *coverture* the legal existence of the wife was merged in that of the husband. The wife was incompetent to bind herself by any contract, and any interest acquired by her in personal property, enured immediately to the benefit of the husband.

In *McNeillage v. Holloway*, 1 B. & Ald., 221, Lord Ellenborough said, that a promissory note given to the wife may be treated by the husband as a personal chattel in possession.

The same doctrine is held in Massachusetts, in the following cases: *Shuttleworth v. Noyes*, 8 Mass., 229; *Com. v. Manley*, 12 Pick., 173.

The principle of the above cases is that a promissory note given or endorsed to the wife in her own name, during *coverture*, was to be considered as absolutely reduced into possession, and would, therefore, go to the executor of the husband to the exclusion of her rights of survivorship.

In the case last cited it was held, that a promissory note given to a *feme covert* for her separate use, for the consideration of her distributive share in an intestate estate, becomes immediately the property of the husband. *Com. v. Manley*, 12 Pick., 173.

By the common law, the earnings of the wife belong to the husband, and he only can give a discharge of them, and must sue for them in his own name, without joining his wife. *Buckley v. Collier*, Salk., 114; 4 Mod., S. C., 156.

The same principle applies to all property which accrues to a *feme covert* during *coverture*.

A legacy given to a wife vests absolutely in the husband, and he may release it either before or after it becomes payable.—*Com. Dig.*, Bar. & Fine, E., 3; *Palmer v. Trever*, 1 Verm., 261.

The distributive share of a wife in an intestate estate vests in the husband. *Robinson v. Taylor*, 2 Bro. C. C., 589.

The moment a note is endorsed to a wife it becomes the property of the husband, and he alone could collect, transfer, or discharge it. *Keith v. Wombell*, 8 Pick., 211; *Russel v. Brooks*, 7 Pick., 65.

In *Barton v. Bishop*, 1 East., 432, a note was given to a *feme*

*covert*, who carried on trade on her own account, to enable her to pay a debt by her contracted in her separate business. She endorsed it to her creditor, who commenced suit upon it. But it was decided that the action would not lie, because the note, when delivered to the wife, became the property of the husband, and that he alone could endorse it.

In *Com. v. Manley*, 12 Pick., 175, it was held, that even if a wife's distributive share of an estate was to be treated like a chose in action, yet when a note was given for it, that would be equivalent to a reduction of it to possession, and the note, as soon as delivered to the wife, would become the property of the husband.

The above authorities clearly show that the entire interest in the bond sued on would, by the common law, be vested in the husband; that he alone could release or discharge the obligation; that the wife would have no right of survivorship, and that, in the event of the husband's death, the property would go to his executor, and not to her.

It is also clearly shown that this bond, when executed and delivered, became a personal chattel, in possession of the husband.

The appellants now contend that the above rules of law prevail in this State, except where they are expressly altered by statute, and that the statute has not altered the common law in respect to the points involved in this case.

By section two of the act defining rights of husband and wife, (Comp. L., 812,) it is provided that all property acquired after marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property.

Section nine provides, that the husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate.

By this statute it clearly appears that the undertaking now sued on, being acquired after marriage, was common property, and that the entire and absolute right of disposition thereof was as completely vested in the husband as it was of his own separate property.

If this be so, then there was no shadow of right of action in the wife, and the Court erred in overruling the demurrer.

In the case of *Snyder v. Webb*, 3 Cal. R., 83, this Court decided that a married woman had no right of action on a lease made by her, because it did not appear, from the complaint, that the action concerned her separate property.

The plaintiff was nonsuited in the Court below, and the judgment was affirmed on appeal.

Mr. Brooks, who now prosecutes this action, defended, in the case of *Snyder v. Webb*, and the Court is referred to his argument in the case, showing that he then maintained the same

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grounds now contended for by appellants, and these grounds were fully sustained by the Court.

The second point relied on by appellants is the error of the Court in overruling the motion to nonsuit.

The case of *Snyder v. Webb*, 3 Cal. R., above cited, shows that this motion should have been sustained.

The third point, in regard to overruling the motion for a new trial, it is unnecessary to discuss.

The last point relied on by appellants is, that, upon the agreed statement of facts, the defendants were entitled to judgment.

The original judgment appealed from was obtained on a promissory note, given by S. R. Thockmorton to Mrs. Paul Tissot.

The action was brought by husband and wife, but no demurrer was interposed in the Court below. On appeal, it was contended that the wife was an improper party, but the Court held that it was too late to make that objection in the Appellate Court, but intimated that if the point had been made by demurrer, it would have been sustained. *Tissot v. Thockmorton*, 6 Cal. R., 471.

It has been shown, by all the authorities cited, that the property in the note, originally given to the wife, vested absolutely in the husband—a *fortiori* the right of action, on the undertaking given to husband and wife, vested in him also. The judgment obtained by Tissot and wife, being common property, and subject to the absolute disposal of the husband, he could release or discharge it, or it might be levied on and held by a creditor of his to satisfy a demand against him.

#### *Brooks for Respondents.*

The counsel in his argument took these grounds :

1. The misjoinder of the wife.
2. That execution should have issued against Throckmorton.

The defendant demurred to the complaint on the first point, the misjoinder of the wife, and his demurrer was overruled, and he had leave to answer, and he answered.

But I have no doubt that the wife was not only a proper but a necessary party. In this case the note given by Throckmorton to the wife upon a purchase of her separate property can only be considered as a substitute in the place of the property, and is still the property. It is but a change of form, and the undertaking given as the security for the payment thereof is but collateral and follows the nature of the original or principal debt.

“If in respect of a contract made with the wife *dum sola*, the party thereto after the marriage give a bond to the husband and wife, or in respect to some new consideration, as forbearances, make a written or parol promise to the husband and wife, they may join. 1 M. & S., 180; 4 T. R., 616; 1 Salk., 117; L. Ray., 368.

“When the wife can be considered as the meritorious cause of

action, as if a bond or other contract under seal, or a promissory note be made to her separately or with her husband, she may join with her husband."

1 Ch. Pl., 30, citing 3 Ser., 403; Stro., 230; 4 T. R., 616; Co. Lit., 35, note 1, 120; 2 M. & S., 393, 395; Bacon Abr., tit. Baum v. Tenk, says:

"In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in the action." And in the case of *Draper, Administrator, v. Jackson and Wife*, 16 Mass., 480: When the plaintiffs intestate joined in a conveyance of the wife's land, and the grantee executed a promissory note to the husband and wife, together with a mortgage as collateral security, it was held that it survived to the wife. *Reeve's Dom. Rel.*, is to the same effect.

I might multiply authorities on this head to any extent. But I don't find any authority to the contrary, and the authorities agree that when a written promise is made to husband and wife they may always join in the action. I say may, for I don't contend that at common law they must join, but as Bacon says: "Where the cause of action would survive to the wife they ought to join." And I have shown that this does survive. And Chitty says, page 30, "In the case of a bond or note payable to her, or to her husband and herself, it would sufficiently appear from the instrument itself as set out in the declaration, without further averment, that she had a peculiar interest justifying the use of her name as plaintiff." Citing 2 M. & Sel., 393, 396. And so for all profit coming from the separate estate of the wife. Chitty 31, and cases cited.

Indeed, in the first action upon the note, I had a doubt whether I had a right to join the husband, the action being of the separate property for which our statute (Prac. Act, § 7) permits her to sue alone. But I thought it safer to join the husband, as the statute does not forbid it. The case of *Snyder v. Webb* did not decide anything to the contrary. That was to the effect that the common law disabilities subsisted except to the extent expressly taken away by statute, and other cases in this Court to the same effect. In the former appeal (*Tissot v. Throckmorton*), the Court said, the point was waived, coverture must be plead in abatement. There was no necessity of passing upon the question of whether the wife ought to join. The complaint should show an interest in the wife, and it does. 1 Chitty, 30.

In regard to the execution. There was no necessity of issuing an execution against the defendant in that suit. There is no such condition in the undertaking, and the point has been frequently decided. "Unless by the terms of the contract a request is necessary, no demand need be averred or found." 1 Chitty Pl., 328, 331; Chitty on Contracts, 628, 29, 456, 466; Seymour v. Van Slyck, 8 Wen., 403; Reed v. Curtis, 7 Greenleaf, 186; Mann

*v. Eckford's Ex'r*, 15 Wen., 502; *Sickleman v. Thistleton*, 6 Maul & Sel., 9. In *Suncer v. Walker*, 5 Gill & Johns. M. R., 102, it was held that the plaintiff might proceed with a *fi. fa.* upon his judgment, and at the same time sue the appeal-bond. In *Teal v. Rice*, 2 Green., 444, the Court held that in a suit against a surety upon an appeal-bond it is not necessary to aver that the debt and costs have been demanded of the principal before action brought. And in *Stanley v. Lucas*, Wright, 44, it was held that it was no bar to a suit on bond that the officer who held the execution was informed that appellant had sufficient property on which the execution might be levied. And to the same effect is *Pevey v. Sleight*, 1 Wen., 518.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

Suit upon an undertaking on appeal. Defendants demurred. Demurrer overruled. Defendants then answered, and plaintiffs had judgment, from which defendants appealed.

The undertaking was executed by defendants, in the case of *Tissot and Wife v. Throckmorton*, (6 Cal. Rep., 471,) which was a suit upon a note executed by Throckmorton to Mrs. Tissot, during the marriage.

The first objection is that there is no averment in the complaint that execution was issued upon the judgment against Throckmorton.

When, by the terms of the contract, express or implied, a request or demand constitutes a condition precedent to the bringing of the suit, then it must be averred. (1 Ch. Plea., 328, 330.) But there is nothing in the undertaking making a request necessary. The defendants bound themselves that the appellant should pay the judgment. The non-payment of the judgment can be shown without the issuing of an execution. (15 Wend., 502; 5 Gill and J., 102; *Nickerson v. Chatterton*, 7 Cal. Rep., 573.)

The second objection is that the undertaking was not executed by Throckmorton, but only by the defendants. This objection has been decided by this Court not to be well taken. (*Curtis v. Richards & Vantine*, January, 1858.)

The third objection is not well taken. The note upon which the suit was brought against Throckmorton was executed to the wife alone, and the undertaking in that case was executed to the husband and wife. There was no proper objection made to the joinder of the wife with the husband in that case; and, by not making any such objection, Throckmorton admitted she had an interest in that suit, and the defendants are concluded by his act as to that matter. But besides this, the undertaking having been executed to husband and wife, she may join; and the un-

dertaking itself shows her peculiar interest in the suit without any further averment. (1 Ch. Plea., 80.)

There is nothing in the other points made by the counsel of defendants. The appeal seems to have been taken for purposes of delay, and the judgment is, therefore, affirmed, with ten per cent. damages.

### THE PEOPLE v. EDWARDS *et al.*

Where there are amendments to a proposed statement on appeal, the draft proposed, and the amendments allowed, should be incorporated into one document, as in their separate form they cannot be regarded as any part of the record.

No averment of notice to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of the one party as of the other.

The defect in the approval of a sheriff's bond cannot be set up as a defence in an action on said bond against the sureties. The object of the law in requiring the approval, is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law.

The offices of sheriff and tax-collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other.

The eighth section of the Act Concerning Official Bonds, which provides that every such bond shall be obligatory upon the principal and sureties therein, for the faithful discharge of all duties which may be required of the officer by any law enacted subsequently, applies only to the duties properly appertaining to his office as such, and not to new duties belonging to a distinct office, with the execution of which he may be charged.

The duties of sheriff, as such, are more or less connected with the administration of justice; they have no relation to the collection of the revenue.

The Revenue Act of 1854 made the sheriff *ex officio* tax-collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miners' licenses: *Held*, that the bond in suit, entered into in 1856, must be deemed to have been executed in view of the provisions of the Revenue Act, and that all delinquencies in the collection of taxes, except foreign miners' licenses, are covered by the bond.

The defects in official bonds, which are cured upon their suggestion in the complaint, in an action upon such bonds, under the eleventh section of the "Act concerning the Official Bonds of Officers," are omissions which, but for the statute, would operate to discharge the obligors.

Where the obligors, in a sheriff's bond, bind themselves, jointly and severally, in specific sums designated, they may all be joined in the same action, but separate judgments are required.

**APPEAL** from the District Court of the Fourteenth Judicial District, County of Nevada.

A statement of the facts appears in the opinion of the Court.

*McConnell & Niles* for Appellants.

There are two questions in the case which strike at the very foundation of the present action, and which, if decided in accordance with our views, must dispose of the case. By referring to the bond, which was executed in 1856, the Court will observe that after going on and stating in the premises the names of the parties bound, and the amount of the penalty, it proceeds as follows—viz.: “to be by us, our heirs, executors, and administrators, well and truly paid in the proportion as follows: J. M. Fonse in the sum of five thousand dollars; Edward McLaughlin, in the sum of four thousand dollars; Charles R. Edwards, in the sum of four thousand dollars; C. K. Hotaling, in the sum of five thousand dollars; James H. Wilcox, in the sum of four thousand dollars,” etc. We filed a demurrer to the complaint, because of the character of the bond, which the Court overruled.

The demurrer involved the objection to the bond above mentioned, but upon consideration, we think perhaps the objection, by way of demurrer, is not well taken, but that the objection is more properly taken to the judgment.

The bond is a good enough bond, doubtless, when properly construed, but we say that the referee has construed it erroneously.

The Court will observe that the judgment reported by the referee against the defendants is a “joint and several” judgment.

Now, it is obvious that the defendants cannot be bound “jointly and severally,” for the whole amount recorded by the judgment, unless they were bound jointly and severally by the bond, and the question is, are they so bound by the bond in this case?

We think not, and we think that the bond, though not joint and several, is according to law.

We concede to the respondents the full force of the argument, predicated upon the statutory requirements in official bonds.

In a case of doubtful interpretation, we believe a statute provision might with propriety be invoked to aid in construing an instrument made in pursuance of the same statute.

But we cannot assent to the monstrous doctrine, that the manifest and ordinary signification of words and sentences in an instrument must yield to a forced and violent construction, because the statute in pursuance of which the instrument was executed, requires it to contain certain stipulations, or to be of a certain form.

The law requires official bonds to be “joint and several,” therefore this bond is joint and several.

This is their argument, an argument which sounds sufficiently foolish when we recollect how many of the law’s requirements are daily disregarded by almost all classes of men.

The plaintiffs evidently regarded the clause of the bond referred to as constituting a defect, because they have suggested it as a defect in their complaint, in accordance with the eleventh

section of the "Act Concerning Official Bonds." Wood's Digest, p. 278, Art. 215. And seek by means of this instrument of judicial charity to cover up and hide the defect.

But we say that it is not a defect, but an additional and very important clause, limiting and controlling the individual liability of each of the sureties. The word "defect" implies an omission, not an addition.

A "joint and several" liability, or, as it is frequently termed, a liability *in solido*, is when two or more persons undertake to pay "one and the same sum to one and the same person." Burge on Suretyship, p. 373. Again: "the whole sum must be owing by each and every of the debtors." *Ibid.*

A joint and several liability, means no more than that each of the obligors is bound for the entire debt or duty, and the obligee may sue one or all, at his option, and recover.

"The effect," says Burge, "of an obligation *in solido*, is to entitle the creditor to recover the whole debt from either of the debtors whom he pleases to select; this is a necessary consequence of each of the debtors being a debtor for the whole." *Ibid.*, p. 406. Again: it is an essential rule of the common as well as of the civil law, that an obligation *in solido*, is not to be presumed, it must be expressed.

The language of the standard authority so frequently cited by us, is, "the obligation is not to be presumed to be *in solido*, but it ought to be expressed; and if it be not, when several persons have contracted an obligation in favor of another, each is presumed to have contracted as to his own part only. *Ibid.*, p. 403, 404. Here, then, we oppose to a presumption arising from statute law, a presumption founded in general law, and the latter must possess as great force with the Court as the former, since a statute requirement is no more the law of the land than the common law, while the latter remains in existence.

From the foregoing authorities and definitions, it is evident, we think, that the defendants were not jointly and severally bound.

A and B agree by the same instrument jointly and severally to pay C five thousand dollars. Here the obligation is *in solido*, because either of them is bound for the whole debt.

But suppose A promises to pay three thousand dollars, and B two thousand, or suppose each undertake to pay one-half of the whole, then the obligation is separate, or there are, in fact, two distinct obligations, although there is but one instrument.

This is precisely the condition of the case at bar.

The entire penalty of the bond is \$24,000, (though the law requires it to be \$25,000,) and each of the bondsmen has expressly stipulated the part for which he will be responsible.

So distinctly have the sureties indicated and marked out, as it were, the limits of their respective liability, that no room what-

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ever is left for the operation of legal presumptions; and if presumptions could prevail, we have shown they are in our favor.

We will here call the attention of the Court to the language of the bond referred to. We do so because the learned Judge who overruled our motion for a new trial, stated a theory in regard to that clause, which, though plausible, we deem entirely unfounded.

While the motion was being argued he let drop the suggestion that the clause in question might perhaps have been inserted for the purpose of regulating the contribution between the sureties themselves, and not as a part of the contract between the obligors and the State.

Now the phraseology of the bond completely neutralize this view.

After stating the names of the parties and the amount of the penalty, etc., the bond goes on to say: "to be by us, our heirs, etc., well and truly paid in the following proportions, etc."

What is to be paid in the following proportions? Why, the penalty of course; and as the penalty is to be paid to the State, it follows that it must be in the mode of payment specified.

It may be asked, what are our views in relation to the proper form of the judgment on a bond like the present.

Inasmuch as we regard it as a thing settled, that the bondsmen have obligated themselves severally, or more properly speaking, separately—and not jointly and severally—the judgment, in our opinion, ought also to be several or separate. That is, the judgment ought really to have as many distinct parts as there are bondsmen, and it should be against each, for a sum proportioned to the sum for which he has bound himself.

If the sum found due, for instance, was for the entire penalty, then the judgment against each surety should be for the full amount in which he has become obligated.

For instance, against Hotaling, the judgment would be for \$5,000; against Wilcox, \$4,000, and so on.

If the whole judgment, as in this case, is for a sum less than the penalty, then the judgment against each bondsman should bear the same proportion to the entire amount of the judgment against them all as the sum for which he became bound was to the entire penalty. That is, if one of the sureties had bound himself for one-fourth of the entire penalty, then judgment should be rendered against him for one-fourth of the entire amount found due the plaintiffs, etc.

Of course our view involves the consequence that each surety, being bound for his principal and himself only in a fixed sum, he cannot be compelled to pay any more than that sum, though one or more of his co-sureties be dead.

As in this case, we do not think the defendants can be held re-

sponsible for that portion of the penalty which J. M. Fonse, (deceased,) undertook to pay.

Nor can the right of distribution exist among them, for that is an incident to *in solido* obligations only. It (the right to contribution,) being so manifestly absent in this case, even according to Judge Searls' opinion, is the very strongest possible proof of the correctness of our views. Burge on Suretyship, pp. 381, 382, 384.

*Meredith & Hawley for Respondents.*

The bond is one executed and given under the "Act Concerning the Official Bonds of Officers," passed Feb. 9, 1850. Wood's Dig., p. 77. It is a statutory bond, and its sufficiency or insufficiency must be determined by the provisions of that law or act. There is no other statute of this State upon the subject of official bonds, which, by any rational rule of construction can affect the obligation of the bond sued upon. The act of April, 1857, p. 80, Wood's Dig., passed nine months after the execution of this bond, cannot be invoked on the one side or the other of this case, for the reason, that by the terms of the act itself, (§ 1,) its operation is confined to official bonds required subsequent to its passage.

The doctrine has been fully recognized by this Court, that statutory bonds must be construed with reference to the statute under which the bonds are given, and indeed so intimate is the connection between the instrument and the act providing for its execution, that the law becomes a part of the contract, and limits and controls the obligation arising upon its execution.

In the language of Chief Justice Murray, "the principle is now familiar, that where parties contract in respect to law, the law itself becomes a part of the contract and they are bound thereby." *Mattoon et al. v. Eder et al.*, 6 Cal. R., 57.

This decision was in an action brought upon a bail-bond, or undertaking in arrest-process, under our civil practice, and is clearly in point.

In the language of Justice Burnett, speaking of the delivery of specific personal property by the sheriff to the complainant suing out process, "it is a condition precedent, apparent upon the instrument, taken and construed with reference to the law under which it was given and which forms a part of the undertaking itself." *Nickerson v. Chatterton et al.*, 7 Cal. R., 568.

The laws in force at the time of making a contract, and those under which it is made, form a portion of the essence of the contract, which must be considered as entered into with reference to those laws and by them be construed. *Reynolds v. Hall et al.*, 1 Scamm. R., 38; *Cox & Dick v. U. States*, 6 Peters' R., 172; *Duncan's Heirs v. U. States*, 7 Peters' R., 435.

The bond sued upon is a joint and several bond for the full

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amount of \$24,000, and that portion of the same which appor-  
tions the obligation among the obligors must be deemed totally  
inoperative as to the State, and in the light of a contract exclu-  
sively between the obligors. The first portion of the bond itself,  
as also the sixth section of the Act Concerning Official Bonds,  
above referred to, clearly makes defendants jointly and severally  
bound in the full amount. Other sections of the same law unite  
to render the liability one of that character. All defects in the  
substantial matter, condition, or conditions, or in the approval of  
an official bond, are cured and remedied by section eleven of that  
act upon the formal suggestion of such defects and omissions by  
the plaintiffs.

This is not a new, nor with us an original, construction of the  
eleventh section referred to, but it is the judgment of this  
Court.

"The eleventh section of the act concerning the bonds of officers,  
provides against the invalidity of the bond even where it does not  
contain "the substantial matter required by law." And the right  
to recover upon such bonds is not limited to any particular class  
of cases, but is co-extensive with the right to recover upon a reg-  
ular statutory bond." *Lloyd Tevis v. Randall et al.*, 6 Cal. Rep.,  
632.

We conclude that if the bond sued on was the official bond of  
Wright, sheriff, that then the sureties, notwithstanding some de-  
fects and omissions in the phraseology of the instrument, as-  
sumed the obligation required by the statute to enable such offi-  
cer to act in that capacity.

FIELD, J., delivered the opinion of the Court—BURNETT, J.,  
concurring.

The papers embraced in the transcript, purporting to be a  
statement, are liable to the objection taken in *Marlow v. Marsh*.  
The draft proposed, and the amendments to it, are not incorpo-  
rated into one document, and in their separate form cannot be  
regarded as any part of the record. The exceptions to the evi-  
dence are not, therefore, before us, and the appeal must be deter-  
mined upon the sufficiency of the demurrer, and the objections  
to the form of the judgment.

The action is brought against the sureties upon the official bond  
of Wright, formerly Sheriff of Nevada county. The bond was  
executed for the faithful discharge of his duties as sheriff, and the  
breaches assigned consist in his failure to pay over moneys col-  
lected by him as taxes, in his *ex officio* capacity of collector, and  
his neglect to furnish, under oath, the account of his transactions  
as such collector, on the third Monday of October, 1856, to the  
treasurer and auditor of the county, as required by statute.  
The complaint contains no averment of notice to the defendants  
of the default of the sheriff, and the only objections meriting

consideration raised by the demurrer are, the want of this averment of notice, and that the bond was not properly and legally approved, and does not cover the delinquencies of the officer as tax-collector.

No averment of notice is requisite where the matters assigned as breaches lie as much in the knowledge of the one party as of the other. (Chitty's Plead., 328.)

The defect in the approval of the bond, if any existed, could not avail the defendants. The object of requiring the approval is to insure greater security to the public, and it does not lie in the defendants to object that their bond was accepted without proper examination into its sufficiency by the officers of the law.

The offices of sheriff and tax-collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. The case of *Merrill v. Gorham* (6 Cal., 41) only decides that there is no constitutional inhibition to the exercise of the two offices by the same person. The offices are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other. The eighth section of the Act Concerning Official Bonds, which provides that every such bond shall be obligatory upon the principal and sureties therein, for the faithful discharge of all duties which may be required of the officer by any law enacted subsequently, applies only to duties properly appertaining to his office, as such, and not to new duties belonging to a distinct office, with the execution of which he may be charged. The duties of sheriff, as such, relate to the execution of the orders, judgments, and process of the Courts; the preservation of the peace; the arrest and detention of persons charged with the commission of a public offence; the service of papers in actions, and the like; they are more or less directly connected with the administration of justice; they have no relation to the collection of revenue. The difficulty, however, with the demurrer is the fact that the Revenue Act of 1854, by virtue of which the sheriff is made *ex officio* tax-collector, provides that he shall be liable on his bond for the discharge of his duties in the collection of taxes, and does not require the execution of any new bond; nor is any other bond required than the one executed by him as sheriff, except when he acts as collector of taxes for foreign miners' licenses. The bond in suit must be deemed to have been executed in view of the provisions of the Revenue Act. For moneys collected for foreign miners' licences, and not paid over, the defendants are not responsible; but all delinquencies in the collection of other taxes are covered by the bond in suit. The demurrer was properly overruled.

The objection to the judgment arises from the form of the bond upon which the suit is brought. The judgment is against all the

defendants, jointly, for a sum exceeding \$6,000. The bond is in the penal sum of \$24,000, for the payment of which the obligors bind themselves, jointly and severally, in certain proportions; two of them each in the sum of five thousand dollars, and four of them each in the sum of four thousand dollars. It was executed previous to the passage of the act of 1857, authorizing official bonds in this form, and, of course, must be construed with reference to the statute under which it was given.

The counsel of the plaintiffs suggest in the complaint, as a defect in the bond, that part which apportions the obligation of payment among the obligors. This suggestion is made under the eleventh section of the Act Concerning Official Bonds, which reads as follows:

“Whenever any such official bond shall not contain the substantial matter, or condition or conditions required by law, or there shall be any defects in the approval or filing thereof, such bond shall not be void, so as to discharge such officer and his sureties, but they shall be equitably bound to the State or party interested, and the State or such party may, by action instituted as other suits on official bonds, in any Court of competent jurisdiction, suggest the defect of such bond, or such approval or filing, and recover his proper and equitable demand or damages from such officer, and the person or persons who intended to become and were included as sureties in such bond.”

It is evident from the language of this section, that the defects which are cured upon their suggestion in the complaint, are omissions which, but for the statute, would operate to discharge the obligors. When the bond “shall not contain the substantial matter, etc., the bond shall not be void so as to discharge such officer and his sureties.” The clause which is suggested as a defect, is not such, but a limitation upon the individual liability of each of the sureties. There are in fact several distinct obligations in the same instrument. The principal and each surety obligate themselves, jointly and severally, in the specific sums designated, and although all the parties may be included in the same action, separate judgments are required; none can be entered against the parties for any greater amount than that for the payment of which they have respectively bound themselves. Of the surviving sureties, four are bound in the sum of four thousand dollars, and one in the sum of five thousand dollars, and separate judgments against them should have been entered for these respective amounts. Of course the several judgments would be all satisfied upon the payment of the amount found due from the late sheriff. The form of the judgment entered in the Court below, might be corrected without vacating the report of the referee, and such would be the direction of this Court, but for a discrepancy apparent upon the report between the amount, to be credited by the stipulation, and that allowed. As the evi-

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dence is not before us, this discrepancy is unexplained, and of itself entitles the defendant to a new trial.

Judgment reversed, and cause remanded.

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MOUNT v. CHAPMAN.

A executed a note and mortgage to B. Subsequently, A and B entered into partnership in the livery business. A was to furnish the stable, hay, and grain, and board B, and B was to attend the stable, the profits to be equally divided, and the share of A was to be applied in discharge of the note. B received the sum of \$396, A's share of the profits of the business, and then, after maturity, assigned the note and mortgage to C. C brought suit against A for the whole amount. A plead payment and set-off: *Held*, that A was entitled to the credit of the payment.

In a judgment in a suit on a note bearing an agreed amount of interest, the interest is to be computed and made a part of the judgment, and the judgment should bear the agreed interest.

APPEAL from the District Court of the Seventh Judicial District, County of Napa.

A statement of the facts appears in the opinion of the Court.

*C. Harston* for Appellant.

The decision and judgment are contrary to the evidence in the case.

The evidence of Waterman, Anderson, and Solon Chapman, uncontradicted, established by the admissions of Murphy, that while he was the holder of the note, all was paid but one or two hundred dollars.

The evidence of defendant, Chapman, shows that not less than six hundred dollars was paid to Murphy on the note before assignment.

It requires the defendant to pay interest on a sum of money greater than the principal sum mentioned in the note, at the rate of two and one-half per cent. per month, there being no agreement to that effect.

The appellant insists that a new trial should have been granted, and that the refusal to grant it was error.

*Botts and Sackett* for Respondent.

One or two of the witnesses testified that they had heard the payee and assignor admit that payments had been made upon the note by which it was reduced to the sum of two hundred dollars: but the whole matter is explained by the testimony of Chapman himself, the defendant, which discloses this state of things: Chapman, the maker of the note, and Murphy, the pay-

ee, became partners in a livery stable. Chapman owned the stable; he was to furnish the hay and grain. Murphy was to attend to the business, and they were to divide the profits. Murphy received the money, and was to keep Chapman's portion of the profits to liquidate the note. Chapman says, in one place, that at one time it was agreed that the note ought to be credited by the sum of \$896. But he says afterwards that they could not agree upon the amount, but he does state most distinctly that he and Murphy never did and never could arrive at a settlement of their partnership account.

We contend that until the amount due from one partner to the other had been ascertained and settled, it was analogous to unliquidated damages, and could not constitute the subject of set-off. The case of *Fremont v. Coupland*, 2 Bingham, 168; 9 Common Law Rep., 531, is exactly in point. This also was a case of stable and horses. The plaintiff sued for rent of stable. The defence was that plaintiff was indebted to defendant for his share of profits, in running a line of coaches. The plaintiff received the fares, and settled with the defendant weekly, the defendant claimed a balance due upon last weekly settlement of \$56. Best, Park & Bunough, agreed, unanimously, that there can be no set-off arising out of a partnership transaction, until there has been a final settlement of the partnership account.

This decision is in accordance with the plainest dictate of common sense. It is utterly impossible that in this proceeding, to which Murphy is no party, the partnership account between Murphy and Chapman can be adjusted. For what amount, then, is Chapman entitled to an offset? It may be that when the partnership debts are paid, there will be no profits to be divided. At any rate, the adjustment must form the subject of a separate action, and until the balance due Chapman is ascertained, it cannot be pleaded as an offset.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

On the fourteenth day of March, 1854, the defendant executed a note and mortgage for six hundred dollars, to Henry Murphy, due on the first day of December following, and drawing interest from date at the rate of two and one-half per cent. per month. On the tenth day of May, 1856, Murphy assigned the note and mortgage to plaintiff. This suit was brought to foreclose the mortgage. The defendant plead payment and set-off. The plaintiff had judgment, and the defendant appealed.

The first material point made by the defendant's counsel is that the Court below erred in not allowing the defendant the benefit of a payment made to Murphy while he was the owner and holder of the note.

It appears that Chapman was the owner of a stable, and that

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in the fall of 1855, it was agreed between him and Murphy that Chapman was to furnish the stable, hay, and grain, and board Murphy, and that Murphy was to attend to the stable—the profits to be equally divided between them, and the share of Chapman to be applied in discharge of the note. The stable was attended to by Murphy until March, 1856, during which time he received various sums upon joint account. It does not certainly appear, from the testimony, whether the parties, by their agreement, contemplated any joint expenses to be paid out of the joint fund, or whether the profits to be divided were the net or gross proceeds.

But we think it unnecessary to decide whether they were or were not partners, as between themselves. Conceding that it was a partnership, we think the defendant had the right to a credit upon the note for the amount received by Murphy. There was a special agreement at the time the partnership was formed that the share of Chapman should be applied as a payment upon the note. This condition must have operated upon the minds of both the parties in making the partnership contract. It does not appear that there were any losses incurred by the firm, and it was only necessary to ascertain the amount received by Murphy, as the share of Chapman. The defendant Chapman was made a witness by the plaintiff, and stated that when they looked over their books the last time, about the first day of May, 1856, it was agreed between him and Murphy that the sum of three hundred and ninety-six dollars had been received by Murphy as the property of Chapman, and that the same should be applied as a credit upon the note. That this amount, at the least, was received by Murphy, is clear, from his acknowledgments to other witnesses, to whom he stated that the note was paid except about two hundred dollars. It would seem clear that Murphy alluded to the principal sum of the note, not including the interest. His admission to Chapman, about the first of March, 1856, that he had received as Chapman's portion of the profits between six and seven hundred dollars, was no doubt based upon an incorrect estimate made from memory, and without any reference to the books of the concern.

The counsel for plaintiff has referred us to the case of *Fremont v. Coupland*, (9 Eng. Com. Law R., 531,) as a case directly in point. In that case it appeared that "the parties had formerly been engaged in running a coach from Bath to London, the plaintiff finding horses for one part of the road, and the defendant for another; and the profits of each party were calculated by the number of miles covered by his own horses. The plaintiff received the fares, and rendered an account to the defendant every week. Upon this weekly account, there was a balance due the defendant of two hundred and fifty pounds. It did not appear, however, that any final account had been stated, or that

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the plaintiff had made any promise to pay the balance in question."

It will be seen that that case differs in one very material respect from this. There was, in that case, no promise to pay the balance; while in this it was agreed *in advance* that the amount should be applied as a payment upon the note. It is true, that the parties had several conferences, and made several attempts to settle the partnership business, and that they never did come to a *complete* settlement. The sum of three hundred and ninety-six dollars was admitted by both parties to have been received by Murphy; and the dispute between them was as to a greater amount, Chapman insisting that the credit should be for more than the three hundred and ninety-six dollars, and Murphy contending it should be for that sum and no more. But the fact that the parties had not mutually agreed as to the whole amount received by Murphy before the commencement of the suit, does not defeat the right of the defendant to insist upon a credit for the amount he can show was received by Murphy, under the partnership agreement. The fact that when the partnership was formed it was expressly agreed between the parties that the share of defendant should be applied as a credit upon the note, and that this stipulation entered into and formed a part of the partnership contract itself, would not permit Murphy to defeat this understanding by assigning the note after due. It is competent for parties to make such a stipulation; and this stipulation will be carried out, notwithstanding the general rule of law, that partners cannot sue each other at law, except upon an ascertained balance, and a promise to pay. Under our system, where legal and equitable remedies are administered by the same Court, and often in the same case, there would seem to be no objection to the enforcement of such a contract in a suit upon the note. The objection to the decree, that the interest upon the note was included with the principal, and that the whole amount was allowed to draw the same rate of interest as that stated in the note, is not well taken. This point has been expressly decided by this Court in *Guy v. Franklin*, (5 Cal. Rep., 416;) *Emerie v. Tams*, (6 Cal. Rep., 155.)

The second section of the act of March 13th, 1850, to regulate the interest on money, provides that a judgment rendered upon a contract to pay a specified rate of interest shall conform to the contract, and shall bear the interest agreed upon by the parties; and that this rate shall be specified in the judgment. The interest already accrued must constitute a part of the judgment, and, therefore, must draw the same rate of interest as the other part of the judgment. The whole judgment under the provisions of the statute must draw the same rate of interest.

Our conclusion is that the decree be modified by allowing the defendant a credit for the sum of three hundred and ninety-six

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dollars, the amount clearly established as having been received by Murphy. The defendant will be entitled to his costs on appeal.

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### THE PEOPLE v. PLUMMER.

It is not error in the Court, on a trial for murder, to postpone the consideration of a motion on the part of the defendant, for a change of venue, until an attempt is made to empanel a jury.

Where a motion is thus postponed, and counsel for prisoner afterwards declines, on the intimation of the Court, to renew the motion, he cannot take advantage, on appeal, of the failure of the Court to order a change of venue.

The declaration of a juror, before trial, that "the people ought to take prisoner out of jail and hang him," renders him incompetent to try the case, and where a verdict of guilty has been found by such juror, the Court should grant a new trial.

**APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.**

The defendant was indicted and convicted of the crime of murder, in the second degree. After the defendant was arraigned and plead, his counsel moved the Court for a change of venue. This motion was based on the ground that a fair and impartial trial could not be had in the county, owing to the prejudice and feeling existing against the defendant, and was supported by a number of affidavits. The motion was argued, and taken under advisement by the Court. The Court then adjourned until the next day. On the opening of the Court the next day an order was made overruling the motion for a change of venue "until such time as an effort shall have been made to empanel a jury, with leave of defendant's counsel to renew the motion, if it shall then appear that an impartial jury cannot be found." One hundred persons were examined as jurors, and only seven were found qualified to serve. The Court thereupon asked the counsel for the defendant if they wished to renew the motion for a change of venue, to which they replied in the negative. Other persons were summoned, and subsequently a jury was obtained.

The defendant, after the verdict of the jury, moved the Court for a new trial, and on such motion produced, and read in evidence, certain affidavits, together with the testimony of a number of witnesses, showing that two of the jurors had formed and expressed an opinion against the defendant previous to the trial. One of the jurors had said, in the presence of a number of persons, and in a public place, that "the people of Nevada ought to take Henry Plummer out of jail and hang him." Another of the jurors said "that Plummer ought to be hung, and that if he was at the Bay he would be hung before night." Another witness

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heard this same juror (Denny) say, at a different time and place, "if Plummer got his dues, they would hang him." Witness testified that the juror, Denny, "seemed down on all men who were situated as Plummer." The Court below refused to grant a new trial, and the defendant appealed to this Court.

*McConnell & Niles* for Appellant.

The Court ought to have awarded a new trial upon defendant's motion.

The grounds upon which we predicate our claim to a new trial may all be reduced to three heads, viz. :

1. The verdict is not the result of a fair expression of opinion on the part of all the jurors.

2. It is contrary to the law and the evidence.

3. The Court erred in matters of law to the prejudice of the defendant.

Upon referring to the section of our criminal practice in regard to new trials the Court will observe that certain grounds are specified upon which a new trial may be granted. See § 440 *Crim. Prac. Act*, *Wood's Dig.*, p. 304.

We were in some doubt at first, whether our objection to the jurors Getchel, Denny, and Jameison, came within any of the grounds there mentioned. But upon reflecting that the only mode by which we could avail ourselves of the objection, was by motion for a new trial—and that such was the universal practice elsewhere, we became convinced that though not distinctly expressed by the statute as an independent ground for a new trial—still it was by a fair construction of the law included within those grounds which are expressed.

The three jurors mentioned above, (Getchel, Denny, and Jameison,) at the time of the empannelment of the jury, each qualified himself by swearing that he had not formed or expressed an opinion as to the guilt or innocence of the defendant, and that he had no bias against him.

After the trial, however, it became known that each of them had not only formed but expressed a most decided opinion that the defendant was guilty of the crime with which he stood charged.

Having incorporated this as one of our grounds for a new trial, we filed affidavits to substantiate the fact.

In regard to the juror Getchel, we introduced the affidavits of Wm. F. Puke and of Calvin Hall.

In regard to Denny, we introduced the affidavits of S. E. Southwick.

In regard to Jameison, the affidavit of F. M. Worsham.

Two of the accused jurors, (Getchel and Denny,) made affidavits denying the statements contained in the affidavits presented on the part of the defendant. These affidavits, together with

one from the defendant himself, denying his previous knowledge of the sentiments of the three jurors, are incorporated in the statement for a new trial.

But witnesses were also called to the same matters, and their evidence reduced to writing, was also adopted, and now forms part of the statement.

These witnesses were Pulse, John Avery, S. E. Southwick, Robert Smith, E. C. Dixon, and Alexander Frazier.

The evidence of these different persons is very distinct and pointed.

Pulse and Hall swear most positively—in affidavits, and as witnesses—that the juror Getchel had expressed a most decided and unqualified opinion of the guilt of the defendant. According to their evidence, this just-minded juror and humane man had publicly avowed the opinion that “the people of Nevada ought to take Henry Plummer out of jail and hang him.”

His friend Avery, in his oral testimony, admits that he made use of the same, or very similar expressions.

It is true, Getchel himself denies that he made such statements—but his affidavit is entitled to no greater respect than his answers to defendant's counsel, when examined by them as to his competency to serve as a juror. He then swore that he had neither formed nor expressed an opinion as to the guilt or innocence of defendant, and his affidavit is a simple rehash of the same statement.

We prove the charge against him by three witnesses: Pulse, Hall, and Avery. Had there been but one, there might have been a pretext for saying, that as there was merely the oath of one man against the oath of another, the presumption would be in favor of the juror's competency. But even in that case, we think the law *in favorum vitæ* would believe the witness, and disregard the declaration of the juror.

But here there were more witnesses than would be necessary by law to convict the juror of perjury, had he been indicted for that crime. Surely then, there were enough in a case where a human life was in actual jeopardy, to convince the Court of the truth of the charge imputed to the juror. In all of the cases to which we shall refer the Court, it will be found that the Court disregarded the oath of the impeached juror.

The juror Denny stated publicly, that “Henry Plummer,” (the defendant,) “ought to be hung.” And on another occasion—the day after the difficulty—he remarked that “Plummer ought to be hung, and that if he was at the Bay he would be hung before night.”

This man appears to have resided in San Francisco during a period of its history which every honest citizen ought to blush to think of—and to have imbibed, in that hot-bed of treason and lawless violence, all the bitter prejudice against a man accused

of crime which at that time prevailed there, together with an ardent admiration for their new and summary modes of procedure and punishment. Such men as he and Getchel ought not to live in a free and civilized country—much less to sit in judgment upon the lives and liberties of its citizens. With such men, to accuse, is to convict—and no evidence, however forcible, if it tended to the benefit of the prisoner, would be regarded.

As regards the competency of Jameison, we produced but a single affidavit—but we think we may leave this juror entirely out of the argument, and rely alone upon our proofs respecting Getchel and Denny.

The substance of the declarations imputed to both jurors is, that Henry Plummer ought to be hung for the act with which he stands charged.

It is true, this is not in terms an expression of an opinion of his guilt. But surely, it embodies within itself such an expression of opinion. For if a man ought to be hanged for an act, it follows that he is guilty of such act. A different construction of their language would place these jurors in the singular and unenviable position of believing and hoping that a man might be hanged, against whom no crime could be shown; in which case it would be regarded as an evidence of malice against the defendant. But whether regarded as the expression of a settled opinion upon the merits of the case, or as an effusion of hatred and ill-will towards the defendant, it would, as we shall show, be equally a good ground for setting aside the verdict, and awarding a new trial.

The expressions used by the jurors, may, with propriety, be referred to two different heads, viz.:

1. Of bias or prejudice against the defendant personally, amounting to ill-will; and,
2. A settled preconceived opinion as to the merits of the case.

The expressions attributed to the jurors are precisely such as we would expect from a man who stood to the defendant in the attitude of a deadly foe, and who, in the climax of his hatred, is willing and anxious to see him sacrificed by means of a judicial murder, or a mob-law murder, without the slightest regard to the question of his guilt or innocence.

The law permits no such malicious sentiments to fill the breasts of those to whose discretion the lives of our people are confided.

In the case of *The State v. Hopkins*, 1 Bay's R., 372, the foreman of the jury had said that he "came from home to hang every damned counterfeiting rascal," and that he "was determined to hang the prisoner, at all events." This was held to be a sufficient ground for a new trial.

Graham & Waterman, in their work on *New Trials*, speaking of that case, say that "it is one of the clearest cases of unfitness of the juror on record." 2 Gra. & Wat. on N. T., 383.

In *Busick v. The State*, 19 Ohio, 198, a juror had made up his mind that the accused was guilty, from statements made to him by one of the grand jury, and stated, that "if the testimony did not hang him (the accused) then there was no use of laws." The Supreme Court of Ohio held him to be totally incompetent, and granted a new trial.

The expressions used by Getchel and Denny seem to us equally as strong as those used by the juror in the case last cited. The difference between them, if any, seems to be in favor of the Ohio juror. For he had at least made up an opinion—it may be an honest opinion—as to the prisoner's guilt; while Getchel and Denny seem not to have troubled themselves much as to whether Plummer was really guilty. They appear to have doggedly come to the conclusion, that he ought to hang, at all events, and that the people would be fully justified in resorting to mob law to gratify their vengeance or their appetite for blood.

We would here particularly call the attention of this Court to the comments of Messrs. Graham & Waterman, upon the case of *Busick v. The State*. 2 Gra. & Wat. on New Trials, 383, 384, notes.

It will be found that we have taken precisely the same steps to fasten disqualification on the jurors, as were taken in that case. There the juror swore at the time he was empaneled, that he had formed no opinion, etc., just as Denny and Getchel did in this case, which led Spaulding, J., to observe, when passing upon the case, that he was almost constrained to say "that the juror was incompetent for the want of a sound moral sense."

In *Monroe v. The State*, 5 Georgia, 85, one of the jurors who tried the defendant, had said, that "from what he knew, he would stretch the prisoner."

The Court granted a new trial—Mr. Justice Lumpkin remarking at the time, that "to convict one capitally under such circumstances, is to perpetrate an offence little short of murder itself."

And again, "the law requires that jurors should be *omni exceptione majores*, not liable to any objection on account of malice, ill-will, hatred, revenge, prejudice, or the like." The entire opinion of Mr. Justice Lumpkin is eminently worthy of careful study, as it explains, in a clear and accurate manner, the law respecting the qualifications of jurors.

In *Sellers v. The People*, 3 Scammon, Ill., 412, a juror, some three or four weeks before the trial, had stated that "the prisoner would and ought to be hung; that salt could not save him; and that there was no law to clear him." But afterwards, he went to the jail, and told the prisoner that he "ought not to be hung—and that if he were on the jury he should not hang." The Supreme Court of Illinois granted a new trial. It will be observed that Judge Douglas, who gave the opinion of the Court,

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apparently places the decision on the ground of "deep-seated malice, concealed under the mask of friendship, destroying its victim by adding treachery to perjury." He assumed that the conduct of the juror had been false and treacherous. Upon this, Messrs. Graham & Waterman remark, "whether such be a legitimate inference from the facts, may be a matter of some doubt. It was, however, highly proper to put a severe construction upon the juror's declarations and acts, and if there was even a remote possibility of his being an improper person, to award to the prisoner a new trial."

We would remark of the Illinois case, that it is very similar to the case at bar in many respects. There, the juror had expressed an opinion both for and against the prisoner. Here, it is claimed that both Denny and Getchel expressed opinions, not, it is true, favorable to the defendant, but expressive of their freedom from bias. It is said that Denny remarked when he started from home to attend the Court, "that he supposed he would be selected as a juror, inasmuch as he had not made up or expressed an opinion of the case."

In the Illinois case, the Court regarded the contradictory opinions as conclusive evidence of treachery on the part of the juror. By the same rule, if applied to this case, Denny and Getchel were guilty of fraud still more gross towards the defendant, and a new trial should be granted on that ground.

In *Cody v. The State*, 3 Howard's Miss. Rep., 27, one of the jurors having declared before the trial, that if he should be on the jury, "he did not think he could clear the defendant, but would be bound to find him guilty," the Supreme Court ordered a new trial.

One or two cases may be found which seem to imply a different rule. But they seem to have been illy considered and badly digested decisions.

In *Howerton v. The State*, 1 Meigs Tenn. R., 263, the defendant, who had been convicted of horse-stealing, asked for a new trial, on the ground that "one of the jurors, before being called had expressed an opinion that the defendant was guilty."

Mr. Justice Reese, in delivering the opinion of the Court, said: "the loose impressions and conversations of a juror, founded upon rumor, would not, if disclosed by him or others to the Court, have the effect to set him aside as incompetent, and might therefore be readily forgotten, or even properly pretermitted by the juror when upon oath, as not deserving to be regarded as the formation or expression of opinions and convictions."

These are singular sentiments to proceed from a learned Supreme Bench. It is precisely the "loose impressions and conversations," so lightly regarded by Mr. Justice Reese, that go to make up a case of fixed bias, prejudice or ill-will. In saying that the juror would be justified in "pretermitting" such conver-

sations, etc., he evidently makes the juror, and not the Court, the sole judge of their importance and legal operation, besides opening the door, if not awarding a premium for any amount of moral perjury from jurors so circumstanced.

The learned authors of the work on New Trials severely censure this decision of the Tennessee Court. "We can not," say they, "reconcile the foregoing decision with our ideas of common justice. The opinion expressed by the juror as to defendant's guilt, was as positive as language could make it. It is evident that he not only condemned the accused before trial, but that he entertained a strong prejudice against him. How preposterous to suppose that such a juror could calmly and dispassionately hear and weigh the testimony and a true verdict give," etc. "It seems that the juror, upon his examination, denied that he had made the alleged declaration, or that he had formed an opinion;" (just as Getchel, Denny, and Jameison, swore upon examination in this case,) "and the Court based its refusal to grant a new trial upon the ground that the oath of a witness or witnesses ought not to countervail the oath of a juror. It is possible that the Court did not believe that the juror made the declaration. We cannot, however, help thinking that the ends of justice would have been subserved by granting a new trial." 2 Graham & Waterman on N. T., pp. 392, 393.

In *The State v. Spencer*, 1 Zabriskie N. J. Rep., 196, the Court held that a "declaration to disqualify a juror in a capital case, must be such an one as implies malice or ill-will against the prisoner." Upon this case Messrs. Graham & Waterman comment as follows: "The learned Chief Justice" (Hornblower,) "could not mean that the declaration must necessarily proceed from a spiteful, malignant, or revengeful disposition; but only that it must indicate that constructive malice which is the offspring of an ill-regulated mind. To hold that a juror shall be competent unless his prepossession is so strong as to amount to malice, is only to exclude him when his integrity can be impeached; for no upright man would consent to sit as a juror under such circumstances, and his taking a seat in the jury-box would imply a dishonest and malevolent purpose."

They then cite from *The State v. Bennett*, 2 Devoreux & Batt. N. C. R., 196. In this case Judge Gaston remarks: "there are unquestionably occasions upon which opinions may be honestly formed and honestly expressed, manifesting a bias of judgment not referable to personal partiality or malevolence. Many must occur in the discharge of public duties, or the duties of friendship, and many even in ordinary social intercourse, to justify and almost compel the avowal of such opinions, without any personal ill-will, or a desire to create prejudice, or with the expectation that he who makes them known will have to sit in judgment

upon the subject to which they refer." 2 Graham & Waterman on N. T., 396, 398.

In *The State v. Scott*, (3 Brevard R., p. 304,) which was a trial for murder, one of the jurors said, a few minutes before he was sworn, "he could not serve, because he had made up his opinion," which was unknown to the prisoner at the time he accepted the juror. The Court refused a new trial, upon the very singular ground that when the juror made such avowal he was not under oath, and that he had denied having an opinion when questioned by defendant. Upon this, Graham & Waterman remark that "a much better reason for the action of the Court would have been that the alleged statement of the juror was sworn to by a single witness."

In the case at bar, however, the statements of the jurors Denny and Getchel were sworn to by three witnesses to each. It is evident that if the reason assigned by the Court in *The State v. Scott*, be a valid one, no verdict can be set aside by reason of the previous ill-will of the jurors, for such ill-will can only be established by the statements of the juror himself.

In addition to these authorities, we call the Court's attention to the following, viz.: *Freeman v. The People*, 4 Denio., p. 9, *Sturdley v. Hall*, 22 Maine R., p. 198, *Bishop v. The State*, 9 Georgia R., p. 121, and particularly to 2 Graham & Waterman, on New Trials, pp. 382-407.

The case of *Bishop v. The State*, 9 Georgia R., p. 121, is strikingly similar to the case at bar. The juror's declaration was, that "if he was on the jury he would hang the prisoner,"—which being proved by three affidavits, the Court granted a new trial.

The case of *Sturdley v. Hall*, 22 Maine R., p. 198, though a civil case, is also strongly in point.

See, in addition, the case of *The United States v. Fries*, 3 Dallas R., 517, principally as illustrating the mode of procedure in such cases. It is also a pointed authority in regard to the effect of such previous declarations on the part of a juror.

This brings us to the consideration of the effect of the statements made by the jurors, when regarded in the light of expressions of preconceived opinions of the guilt of the defendant.

No man is a good juror, especially in a capital case, who entertains inimical sentiments towards the defendant, or has formed or expressed an opinion of his guilt. In the language of the eminent Judge Woodbury, "it is highly important that the conflicting rights of individuals should be adjusted by jurors as impartial as the lot of humanity will admit. Their minds should be as free as 'unsunned snow' from any previous impressions, and should receive no hue but what the law and the evidence at the trial may impart. It is important, too, that parties should be satisfied of their fairness—else a reproach will light on the inval-

uable institution of juries, and general confidence in the administration of justice become weakened." *Rollins v. Ames*, 2 New Hamp. R., p. 349.

In another case, it is said that "every juror's mind should be as white as paper." *Monroe v. The State*, 5 Georgia R., p. 85.

In *Childers v. Ford*, 10 Smede & Marshall R., p. 25, which was a civil case, a new trial was granted because one of the jurors had expressed an opinion before the trial that a certain conveyance, which came in question at the trial, was fraudulent. Upon his examination, as to his qualifications as a juror, he swore that he had not formed nor expressed an opinion; and the Court said that "he lacked the first element of a good juror, veracity."

In *Tenny v. Gilchrist*, 12 New Hamp. R., p. 462, another civil case, the foreman of the jury had stated to each party (in jest, however, as he claimed,) "that he would lose the case." The plaintiff had said that "the foreman could give him the verdict if he would," but it appeared that he (the foreman) was the very last man to avow his opinion in the jury-room in favor of plaintiff. But the Court held that he was an improper juror, and granted a new trial.

We have, thus far, cited no case except those in which the fault of the juror, not being discovered till after the trial, was made the ground of a motion for a new trial. We might refer the Court to hundreds of cases where the same points, arising upon challenges to jurors, were ruled in the same way, and it is evident that an objection, good when taken by way of challenge to the juror when he is called and sworn, must be equally good, when, not being discovered before the trial, it is made a ground for a new trial.

In *Moss v. The State*, 10 Humphrey's R., p. 456, a juror who had formed an opinion upon mere rumor, which he thought would not so far influence his mind but that he could do justice to the prisoner, was held incompetent, because "he had such prepossessions against the defendant as would only yield to the evidence at the trial."

This Court held the same doctrine in the case of *The People v. Wallace Gehr*, Oct. Term, 1857. 2 *Graham & Waterman on New Trials*, pp. 407-418.

4. We had also intended to present at length our views in regard to the order of the District Court, overruling our motion to change the place of trial.

But we shall only refer to this point at present, as another argument to fortify our position, that the defendant did not have a fair and impartial trial by a fair and impartial jury—and that this Court is bound in duty, and for the ends of justice, to interpose and save him from the consequences of a verdict, which circumstances will warrant us in calling the result of a "foregone conclusion."

This motion was based upon affidavits from every election precinct in the county. Some three hundred jurors were summoned to enable us to get twelve men, who pretended that they had not made up their minds definitely as to his guilt, and some of whom entertained the most bitter prejudices against him personally. A clearer case of an unjust verdict can scarcely be imagined. If this defendant is not entitled to come to this Court for redress against a great wrong, disguised by judicial forms, who can be ?

*Thomas H. Williams, Attorney-General, for Respondent.*

The learned counsel for appellant have assigned several causes of error, upon which they ask a reversal of the judgment rendered in the Court below, but only urge especially two of them. The first and most important of which is placed under the head of "error in refusing defendant's motion to set aside the verdict, and grant him a new trial."

Various reasons are attempted to be given why this motion should have been granted, some of which, at first blush, would strike one as tenable, but on examination, lose all force.

In their division of causes under this head, the first which is presented is as follows :

"The verdict is not the result of a fair expression of opinion on the part of all the jurors."

Upon examination, it will be found that this objection is intended to apply exclusively to the supposed incompetency of certain jurors, who, it is said, had formed or expressed opinions against the appellant prior to being called as jurors, but on examination upon their "*voir dire*," disavowed such opinion, etc., the appellant, it is said, being unaware of the opinions of said jurors, until after verdict.

In answer, I submit that this is not a ground for new trial.

The statute (Wood's Digest, p. 304, Art. 1679) declares that "the Court has power to grant a new trial in the following cases only," and then follows the enumeration of the cases, to none of which this belongs; to bring it within either of the enumerated causes, would be unwarrantable distortion of the English language.

It may be the practice elsewhere (and should be so here) to grant new trials upon this ground, but it cannot so be in our Courts, because the statute expressly forbids it, and it is not the province of this Court (so long as we have wise Legislatures) to make the law.

It must pronounce the law as it may find it, however great the hardships, leaving the evil to be corrected by some other department of the government.

I make this objection for the purpose of having the practice established, more than for its effect upon this case, for I do not

believe that the facts, when understood, warrant any interference with the judgment.

I am willing to admit, that if such would in any case be good cause for new trial, and if the evidence warranted the conclusion that the jurors Getchel and Denny deliberately uttered the expressions imputed to them by appellant's counsel in their brief, then under the law a new trial should be granted in this case.

But I cannot agree with the learned counsel in their conclusions of fact, and it occurs to me that if they had read Graham & Waterman less, and the evidence more, they might have saved much laborious writing.

A proper analysis of the testimony upon this point is necessary, before an examination of the law is had, and I therefore call attention to such portions of it as legitimately affect the question. And, first, in reference to the juror Getchel, we find the *ex parte* evidence or affidavit of the witness Pulse, in which he says that Getchel declared that "the people ought to take Henry Plummer out of jail and hang him;" afterwards this Pulse was brought before the Court, when an opportunity was had for cross-examination, and his statement differs materially from the affidavit made by him. It seems also that he is asked as to the sentiments he entertains towards the juror Getchel, whom he is attempting to brand as an unprincipled perjurer, and answers that he entertains towards him no enmity; he also states that a number of persons were present and heard Getchel's remarks.

In answer, Mr. Getchel testifies that this statement by Pulse, is "unqualifiedly false," and that Pulse is at enmity with him. Avery speaks of the ill-will between Pulse and Getchel, and says that Getchel stands as high as any man in his neighborhood.

All the facts and circumstances taken together, must satisfy this Court that the affidavit of Pulse does not contain the true facts. If true, it is a little singular that no other witness is brought to sustain him, when he says that a number were present at the remarks.

Calvin Hall, in his affidavit, testifies to a similar statement made by Getchel to that which Pulse swears to; in his testimony before the Court, we find it different, and it is a little remarkable that he and Pulse both place in Getchel's mouth the same language, at different times and places; one has him before the Miner's Hotel, the other near Culver's store.

Getchel also says that Hall's statement, in his affidavit, is false, and that Hall is at enmity with him. Avery says that Hall was at enmity with G., and told him (Avery) that he had never heard G. express any unqualified or decided opinion in regard to the case. I might repeat here as applicable, remarks

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made in reference to the attacks upon Getchel by Pulse, and leave the juror in the hands of the Court.

In regard to the juror Denny, the first affidavit charges him with saying in a saloon, that "Plummer ought to be hung," afterwards, upon being examined before the Court, he says that he (witness) remarked that a man who could take another's wife away, and then shoot him down like a dog, ought to be hung," and Denny agreed with him. This is widely different from his affidavit, and he says that Dixon, among others, was present.

Dixon says that he did not hear any such language, and Denny flatly contradicts him.

Comment in reference to Southwick's testimony is unnecessary.

The answers of the jurors in their affidavits would have been sufficient, without other testimony. Graham & Waterman, on New Trials, 413, 414, 415.

It may be possible that the jurors uttered, in the presence of the witnesses, some loose expressions in reprobation of the conduct of Plummer, or his attack upon the deceased, which they magnified into the statements contained in their affidavits. But such expressions, when satisfactorily shown to have been made, would not warrant a new trial. Graham & Waterman, 417.

TERRY, C. J., delivered the opinion of the Court—FIELD, J., and BURNETT, J., concurring.

The defendant was convicted, before the District Court of Nevada county, of the crime of murder in the second degree, and, his application for a new trial having been denied, appeals to this Court.

There are several objections taken to the legality of the mode of empanneling the Grand Jury, as well as to the refusal of the Court to permit certain questions to be asked of individual jurors. which we do not think well taken, nor do we think it is necessary to examine these questions separately or at length, as they involve no principle not already passed upon.

There was no error in postponing the consideration of the application for a change of venue until an attempt was made to empanel a jury, and as the counsel, after a number of persons had been rejected, declined, on the intimation of the Court, to renew his motion, he cannot take advantage of the failure to order a change of venue.

In support of his motion for a new trial, defendant offered evidence to show that certain jurors, who acted in the trial of the cause, were incompetent, from actual bias.

And the question is presented, whether an objection to the competency of a juror can be taken after verdict. On this point we have no doubt.

One of the dearest rights guarantied by our free Constitution

is that of trial by jury ;—the right which every citizen has to demand, that all offences charged against him shall be submitted to a tribunal composed of honest and unprejudiced men, who will do equal and exact justice between the government and the accused, and in order to do this, weigh impartially every fact disclosed by the evidence. This guaranty, long regarded as of inestimable value, would be entirely worthless if persons are admitted in the jury-box who are influenced by passion, ill-will, or prejudice, or who, by reason of having formed an opinion as to the merits of the case, will be incapable of deciding with perfect impartiality.

In *Rollins v. Adams*, (2 N. H., 349,) Judge Woodbury remarked: "It is highly important that the conflicting rights of individuals should be adjusted by jurors as impartial as the lot of humanity will admit; that their minds should be as free as the unsunned snow from any previous impressions, and should receive no hue but what the law and the evidence at the trial may impart." If this be true of cases between individuals, involving questions of property, with how much greater force does it apply to cases involving the life or liberty of a citizen? In *McLean v. The State*, (10 Yerg., 241,) the Court said: "The trial by jury has always, in England and in this country, been considered of such vital importance to the security of the life, liberty, and property of the citizen, that great care has been taken to preserve it unimpaired. That the accused may have the full benefit of a judgment by his peers, it is absolutely necessary—

"First, that the minds of the jurors should not have prejudiced his case; second, that no impression should be made to operate on them, except what is derived from the testimony given in Court; and third, that they should continue impartial.

"A trial before a prejudiced jury, or one composed of men who had already prejudged the case, is a mere mockery of justice.

"It is intended that jurors, before acting as such, shall know nothing of the matter in difference, or of the parties; that their minds shall not be preoccupied, but they shall be prepared to receive and to weigh such proofs as may be submitted to them. Unless they do this, it would be better for them to retire and deliberate upon their verdict as soon as they are empaneled, and thus save time, labor, and much expense, as well as spare themselves the hypocrisy of pretending to decide according to law and evidence. The very meaning of the word *trial*, which is an '*examination by a test*,' shows that the triers are to act not upon previously formed opinions, but upon *inquiry*, first instituted and carried on before them. Moreover, if each juror forms his opinion before taking his seat, the case is, in reality, predetermined by persons who, at the time of making their decision, are not jurors. So that the wholesome restraint of the oath administered to the jurors—the solemn proceedings of the Court—the

opportunity to observe the demeanor of the witnesses—the thorough public sifting and scrutiny of the evidence—the explanations of counsel—the instructions of the Judge, and the deliberations of the jury, enlightened by private discussion after they have retired—are so many useless forms, and the parties have only the appearance of jury trial, without any of its benefits.” (2 G. & W., 374, on New Trials.)

Objections to the competence of a juror are not cured by verdict. “Whatever would be a good ground for a challenge to a juror, if discovered in time, will be cause for granting a new trial, if not discovered till the jury have retired to consider their verdict.” (Hardin, 167; 5 Geo., 142.)

“In *The State v. Hopkins*, (1 Bay, 373,) an affidavit was produced, that the foreman of the jury had on the morning of, and before the trial, said that he had come from home to hang every damned counterfeiting rascal, and that he was determined to hang the prisoner at all events. This, it was contended, was such an improper piece of conduct on the part of the foreman, as was sufficient to vitiate any verdict, much more so where the life of a citizen was concerned. The Court were of the opinion that the objection was a good ground for a new trial; and that it would be difficult to say that it was not so, even if the witness was of a suspicious character. At all events, it is a doubtful point, in which case it was the duty of the Court to lean on the merciful side, and give the prisoner another chance for a fair trial.”

In *Busick v. The State*, (19 Ohio, 198,) on motion for a new trial, it was shown that one of the jurors who acted on the trial of the case had, before the trial, declared in conversation with one of the grand jury who found the indictment, “if George Busick is not hung, there is no use of law,” the Supreme Court held this a sufficient ground for a new trial.

In *Monroe v. The State of Georgia*, a new trial was granted, on the ground that one of the jurors had declared before trial, that “from what he knew, he would stretch the prisoner.”

Lumpkin, J., delivering the opinion of the Supreme Court said: “The law requires that jurors should be *omni exceptione majores*, not liable to an objection on account of malice, ill-will, revenge, prejudice, or the like. If they are under any of these influences, they are certainly improper jurors to try a citizen for his life. \* \* \* Prisoners have rights, and there are certain legal safeguards which must be preserved immaculate; the purity of the stream of justice is involved in it. One of these safeguards is that the jury shall be impartial and unbiased, their minds free from prejudice. I must say that he who gets his consent to serve on a jury, when he must know that his mind is utterly disqualified from doing justice between the prisoner and the State, is guilty of gross misconduct. To convict one under

such circumstances, is to perpetrate an offence little short of murder itself."

In the case of *Sellers v. The People*, (3 Scam., 412,) one of the jurors, before the trial, had said "that the prisoner would, and ought to be hung," "that nothing could save him, that salt could not save him, and that there was no law to clear him," but afterwards he went to jail and told the prisoner, "that he ought not to be hung. and if he were on the jury he should not be hung." "When sworn on his *voir dire*, stated that he had formed or expressed no opinion." The Supreme Court of Illinois on these facts granted a new trial. Judge Douglas, in delivering the opinion, said: "It would be difficult for any one, in the fullness and freshness of our language, to select, or invent forms of expression which would more clearly and emphatically convey a firm conviction of guilt, and at the same time preclude all hope or possibility of escape on the part of the prisoner. They furnish a strong case, and bring it fully within the authorities cited, and hence establish the incompetency of the juror. Can it be insisted that the juror was impartial; that he possessed that moral perception, that sense of justice, that integrity of character which would qualify him to pass upon the life of a fellow-citizen? It presents the revolting spectacle of deep-seated malice, concealed under the sacred garb of friendship, destroying its victim by adding treachery to perjury. It is wholly immaterial, for the purposes of this motion, whether the prisoner be guilty or innocent; law, justice, humanity, forbid that he should be deprived of his life by such means, and by a jury thus constituted."

In the case under consideration, it appears that George L. Getchel and J. G. Denny, who acted as jurors on the trial of the defendant, had, on being examined on their *voir dire*, answered satisfactorily, and were accepted as jurors.

After verdict, defendant introduced the affidavits of Pulse and Hall, as to the declarations of Getchel, and the affidavit of S. Southwick as to the declarations of Denny, made before trial. The affidavit of Pulse stated that Getchel, soon after the killing with which defendant was charged, declared that "the people ought to take Plummer out of jail and hang him," and on other occasions expressed a belief that he was guilty of murder.

In addition to the affidavits, witnesses were examined both by the accused and the prosecution, as to the facts alleged. The testimony of the witnesses corroborate the statement in the affidavits, and, we think, clearly establish that such a declaration was made by the juror. In the testimony there is but little conflict. Avery, a witness for the prosecution, and an intimate friend of Getchel, states that he was present at the time alluded to, and that he thinks Getchel said that Plummer ought to be hung; there were several present during the conversation, all of

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whom appeared to think Plummer ought to be hung; and though not certain, he thinks the remark was made by Getchel.

Getchel files an affidavit denying the facts stated in the affidavits, but we think this affidavit not sufficient to overthrow the testimony of three witnesses, one of whom was called by the prosecution, and was the intimate friend of the juror. Indeed, it would seem that his affidavit is entitled to no more weight than his solemn declaration on his *voir dire*.

In regard to Denny, the affidavit of Southwick is corroborated by the evidence of R. Smith and Alex. Fraser, and controverted only by the affidavit of the juror.

The remark of Denny, as stated by Southwick, was that "Plummer ought to be hung, and if he was at the Bay he would be hung before night." Smith and Fraser both testify to hearing him say that Plummer ought to be hung.

This conscientious juror does not seem to have troubled himself to inquire whether the defendant was guilty or not; with him, it appears that the accusation was sufficient; in the language of witness Smith, "he appeared to be down on all men situated as Plummer was."

It is clear that neither of these jurors was competent to sit upon the trial of defendant, if indeed they were competent to sit in any case involving the life or liberty of a citizen.

A man who could so far forget his duty as a citizen, and his allegiance to the Constitution, as to openly advocate taking the life of a citizen without the form of law, and deprive him of the chance of a jury trial, would not be likely to stop at any means to secure, under the forms of a legal trial, a result which he had publicly declared ought to be accomplished by an open violation of the law.

Judgment reversed, and a new trial ordered.

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## PEOPLE v. PETERSON.

An indictment against a bailee for converting to his own use certain coin and gold-dust, the property of another, must state the character of the bailment and the description of the coin.

APPEAL from the Court of Sessions of the County of San Francisco.

Charles M. Peterson was indicted by the grand jury of the County of San Francisco, for converting to his own use certain coin and gold-dust, the property of John A. Clary.

The material averment of the indictment is as follows :

"That Charles M. Peterson, of the city, county, and State, aforesaid, on the twentieth day of June, A. D. one thousand eight hundred and fifty-seven, at the said city and county, being then and there the bailee of forty pieces of gold coin usually called twenty-dollar pieces, of the value of eight hundred dollars, and of fifteen ounces and four-fifths of an ounce of gold dust, of the value of two hundred and seventy dollars, the money, goods, and chattels, of John A. Clary, of whom he, the said Charles M. Peterson was then and there the bailee, did then and there as such bailee, as aforesaid, feloniously convert the said forty twenty-dollar gold-pieces, of the value of eight hundred dollars, as aforesaid, and the said gold dust, of the value of two hundred and seventy dollars, to his own use, with the intent, then and there, feloniously to steal the same, contrary to the form, force, and effect of the statute in such case made and provided," etc.

To this indictment the defendant plead not guilty, and was tried and convicted, as charged in the indictment.

Defendant's counsel moved for a new trial, and also in arrest of judgment. Both motions were denied. The motion in arrest of judgment was based upon the following grounds :

1. That the indictment does not substantially conform to the requirements of sections 237 and 238 of the Criminal Practice Act.

2. That the facts stated in the indictment do not constitute a public offence.

The defendant appealed.

*W. W. Chipman* for Appellant.

The indictment is bad in that it does not set out the specific character of the bailee, nor the nature of the bailment, whether *depositum*, *mandatum*, *commodatum*, or any kind. Many "particular circumstances" are omitted.

The facts stated do not constitute a public offence.

*Attorney-General* for Respondent.

This case involves precisely the same questions as that of *The People v. Mackinley*. Reference is therefore made to the brief on file in that case.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

The defendant was indicted, tried, and convicted for the conversion to his own use, whilst bailee, of certain coin and gold-dust, the property of one John A. Clary. Motions were made in arrest of judgment and for a new trial, which were overruled by the Court below, and the defendant appealed.

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Alderson v. Bell.

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The indictment is defective in not stating the *character* of the bailment, and in the description of the coin. (The People v. A. A. Cohen, 8 Cal. R., 42.) It is unnecessary to notice the other points made by appellant.

It is but just to state that the indictment was drawn and the trial had before the decision of this Court in the case of Cohen was rendered.

Judgment reversed, and cause remanded for further proceedings.

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### ALDERSON v. BELL AND WIFE.

Courts will take judicial notice of the signatures of their officers, as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signature of the parties. In the absence of such evidence, the Court cannot notice them.

The recital in a decree that "defendants had been regularly served with process, or had waived service by their acknowledgment," is sufficient evidence that the requisite proof was produced. In the absence of all evidence on this point, the presumption would be in favor of the jurisdiction of the Court, and of the regularity of its proceedings; and, for the want of such evidence, the decree cannot be impeached in a collateral action.

The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken.

A decree cannot be impeached collaterally, because entered prematurely. The remedy is by a direct proceeding in the action.

In this State, the wife can appear in, and defend an action, separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of *feme sole*, and be able to make as binding admissions in writing, in the action, as other parties.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action of ejectment brought against Alfred Bell, to recover possession of a house and lot in the city of Placerville.

Plaintiff purchased the premises under an order of sale, issued on a judgment of foreclosure of mortgage against Bell and wife, and in favor of himself. A sheriff's deed was duly executed and delivered by the sheriff to the plaintiff. The mortgage foreclosed was executed by both Bell and his wife.

Bell filed his answer, denying the allegations in the complaint, and setting up the fact that he was a married man, living on the property with his family, at the time of plaintiff's purchase under sheriff's sale, and claiming the property as a homestead. Mary Bell, wife of the defendant, intervened in the action, averring that she resided on the premises with her husband, and claimed the property as a homestead.

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Alderson v. Bell.

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The only point made on the trial was as to the sufficiency of the following acknowledgment of service in the suit to foreclose the mortgage, endorsed on the complaint in that suit, viz. :

“ We acknowledge service of the above complaint, and waive any other service and notice in the within-entitled cause.

“ ALFRED BELL,

“ MARY BELL.

“ NOVEMBER 6, 1856.”

The recital in the beginning of the decree of foreclosure, is as follows :

“ In this action, the defendants having been regularly served with process, or waived service by acknowledgment, and having failed to appear,” etc.

The Court below found that the premises in question had been dedicated as a homestead, but decided that the sale, under the decree in the foreclosure suit, divested the right of the wife in the premises, and gave judgment for the plaintiff, and defendants appealed.

*Sanderson & Newell* for Appellants.

The plaintiff, in support of his title, introduced the judgment-roll in *Thos. Alderson v. Bell and Wife*, which was objected to by defendant, but admitted by the Court, defendants excepting, and herein the Court below erred, for the following reasons :

1. The judgment-roll does not show that the Court from which it emanates ever acquired jurisdiction over the persons of the defendants, or, in other words, there is no sufficient proof of service of summons.

2. The service purports to have been made by the written admission of the defendants, and there is no proof of their signatures.

3. The written admission of service does not disclose the place where the same was made.

4. The defendant, Mary Bell, being a married woman, could not acknowledge service.

5. The judgment-roll, in order to become evidence, must embody within itself the proof of service, which cannot be shown by parol, or otherwise than by the record itself.

6. Legal proof of service cannot be presumed. It must appear upon the face of the record.

7. If the presumption can be indulged at all, it is only in cases where the person offering the record is not a party thereto. They cannot be indulged in this case, for the party offering the record is also a party to it, and therefore chargeable with full notice of all its irregularities.

As to first point, a judgment-roll which contains no appearance

or proof of service of summons, is not admissible as evidence. *Moore v. Farron et al.*, 3 A. K. Marshall, 41; *Bradshaw v. Heath*, 13 Wen., 407.

"A judgment without notice, and without the appearance of the party against whom it was rendered, is a nullity." *Enos v. Smith*, 7 S. & M., 85.

The Court must have jurisdiction over the person of defendant, and it must appear affirmatively, and cannot be presumed. *Wright v. Warner*, 1 Long., 384; *Clark v. Holmes*, 1 Long, 390.

"Judgment cannot be rendered against a party unless he be brought into Court by legal means." *Jones v. Kenney, Hardin*, 96.

In this case, there was no appearance of the defendants, for the judgment is by default—nor, as we say, is there any proof of service of summons at all.

The only proof, disclosed by the judgment-roll, of service, is the written admission of the defendants, in the following words, to wit :

"We acknowledge service of the above complaint, and waive any other service and notice in the within-entitled cause.

"NOVEMBER 6, 1856.

"ALFRED BELL,  
"MARY BELL."

This amounts to no proof of service :

1. Because it does not state place of service, in conformity with the statute. Practice Act, §§ 34, 203.

2. Because it contains no proof of the signatures. Practice Act, § 203; *Litchfield v. Burrell*, 5 Howard's Practice Reports, 341.

Proof of signature must be made, and that must be embodied in the judgment-roll. 5 How. Prac. Reports, 341; Practice Act, § 203.

The judgment being by default, the roll must disclose proof of service. In this case it does not, or at least the proof disclosed is clearly insufficient to give the Court jurisdiction over the persons of the defendants. That proof of service was made can not, nor was it attempted to, be supplied by parol, nor can it be presumed, as we have already shown. The judgment would have been reversed on appeal. *Joice v. Youger*, 5 Cal., 449.

The present plaintiff being also a party to the judgment-roll in question, is chargeable with full notice of a want of service, and, therefore, took nothing by his purchase.

Again : as to defendant, Mary Bell, being a married woman, she can do no act, nor execute any writing, nor bind herself by any admission. Such is the general rule of law; her legal capacity being merged in that of her husband. There are exceptions

to this rule, but the present case does not come within them. Having signed with her husband, the presumption would be that she did so through his coercion. The property being a homestead, the clearest proof should be required of service upon the wife. No such proof being contained in the judgment-roll, and none having been supplied *aliunde*, the judgment-roll was improperly admitted in evidence, and the judgment of the Court below, in the present action, should be reversed.

*W. H. Brumfield* for Respondent.

1. Service may be had by written admission and waiver. § 38, Prac. Act.

2. From the time of service the Court acquires jurisdiction over the parties, and from that time has "control of all subsequent proceedings. § 35 Prac. Act.

3. The written admission is not required to be accompanied with an affidavit to prove it, therefore, it can only be proved by oral testimony. Affidavits and certificates of service are the evidence of the service, in other cases. § 34, Prac. Act.

4. Nor is the written opinion made part of the judgment-roll. § 203, Prac. Act.

This section is merely directory. 9 Pr. Reports, 86.

5. A married woman is an independent defendant, and defends in her own name, and "for her own right." § 7, Prac. Act; *Kashaw v. Kashaw et al.*, 3 Cal., 212.

6. The appellants' testimony in this case on the trial, proves that the defendant to that judgment resided in the county when the same was rendered, at the time the written admission was executed, which is *prima facie* evidence that it was done in the county where the judgment was rendered.

7. The judgment of a Court of general jurisdiction, cannot be attacked collaterally for irregularity of the service.

The remedy is by appeal or application to the Court rendering the judgment. *Dorante v. Sullivan*, 7 Cal. R., 279; *Cook v. Darling*, 18 Pick., 393; 2 American Leading Cases, 737; *Folsom v. Root*, 1 Cal., 375; *McFadden et al. v. Jones et al.*, 1 Cal., 453; *Crane v. Brannan*, 3 Cal., 192; *Webb v. Hanson et al.*, 3 Cal., 65; *Bidleman v. Kewen*, 2 Cal., 248; *Buchmaster et al. v. Jackson et al.*, 3 Scam., 105, 108.

Before a judgment will be rendered by the District Court it must be shown that the Court has jurisdiction by service or otherwise. If the service is by the sheriff it is shown by his return, if by any other person, by an affidavit; but the service by written admission is shown by oral testimony, as an ordinary warrant of attorney to confess judgment, or as any other fact is made known to a Court, when the manner of making it known is not expressly provided by statute. The written admission is not required to be in any particular form. Section thirty-four

does not require it to specify time and place, as is required in case of the officer's certificate, or the affidavit, for they are evidence, but it is not.

Nor is it made part of the record by section 203, but this section is merely directory. 9 Prac. Rep., 86.

And section thirty-three only regulates, or specifies, what the Court trying the case shall receive as evidence, and from the time of the service or waiver, the Court acquires jurisdiction of the parties, and has "control of the subsequent proceedings." That jurisdiction cannot be defeated, or that "control" taken away, on account of any irregularity or defect in the evidence. The Court rendering the judgment either had, or it had not jurisdiction; if it had, the jurisdiction attached from the time of the service, but section thirty-five clearly settles this point.

If Mary Bell was a proper party to the action in which the judgment of foreclosure was had, under our Practice Act, she stood upon the same footing of other defendants, except minors and others having no legal capacity to act. She was an independent party, capable of acting for herself, and beyond the control of her husband. Section seven of the Practice Act clearly gives her all the rights of other defendants, and makes but one exception, and that is, in some cases her husband must be made a party with her, but in all she may "defend for her own right," and her defence does not depend upon her husband, nor is it material whether he defends or not; where she is a party, with the ability to prosecute and defend, she must get into Court as other parties do. Section twenty-nine of the Practice Act provides for service upon persons incompetent to act for themselves, and how they must be got into Court. And section seven provides how they may appear, and defend or prosecute, and they can neither appear nor be brought in any other way. They must appear by guardian, and can waive nothing, because they can not act (legally.) A married woman is not required to appear by "next friend," under our Practice Act, as in New York, under § 114, New York Code. See 3 Cal., 312.

Our Practice Act, in regard to the written admission, also differs from the New York Code, § 138. There, the written admission, as well as the affidavit or certificate of service, must show the time and place of its execution, and be established by affidavit, and then it becomes evidence of itself. 1 Code Rep., N. S. 42; 5 How. Pr. Rep., 341.

But if there is any doubt as to the place where the written admission was executed, the appellants settle it, by showing that they resided in the county where the judgment was had at the time of the execution of the writing, and that they still occupy and claim the premises as a homestead.

But, by the written admission, Mary Bell waived no right whatever. She had the right to make the mortgage with her

husband, and if it was afterwards foreclosed, and the property sold, she had the right of redemption. If she had not the right to waive or admit service, she was not in the enjoyment of all the privileges of other defendants. She could not get into Court without paying, or subjecting her homestead to the additional fees of service by the sheriff. The waiver creates no further incumbrance on her property, but on the contrary, saves it from the officer's costs; and this is sometimes the object of such service, but more generally to avoid the supposed odium of having process served by the sheriff. She could defend as well after as before signing the admission.

A homestead can only be incumbered or conveyed by the joint act of husband and wife. Her separate property can only be incumbered and conveyed as required by statute. These are restrictions, but how far they bind the wife as to her separate property, may be a matter of doubt. But these cases differ from that of prosecuting or defending, for when she wishes to prosecute, she may do so in all cases where she is the proper plaintiff, just as other plaintiffs. And when sued, she defends, as any other person; and in all these cases, she acts as *feme sole*. And when by law she may act, her acts are binding.

In this case, the appellants voluntarily give the Court jurisdiction over them; permit the Court to render judgment against them; suffer the property to be sold by order of the Court; let the six months for redemption run out; and when, near a year after, sued for possession, charge the Court with improper conduct in permitting the judgment to be taken without sufficient evidence of service, and set the whole proceedings of the Court at defiance. They are too late with their complaints; if an irregularity in the proceedings did exist, they should have appealed.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

This was an action of ejectment, to recover certain premises situated in Placerville. The plaintiff asserts title to them by virtue of a sheriff's deed, executed to him as purchaser at a sale under a decree recovered against the defendants in a foreclosure case. On the trial, the plaintiff gave in evidence the record of the decree, and proceedings in the foreclosure case; to which objection was taken, on the ground that they did not disclose any service upon the defendants, as required by statute. The objection was overruled, and the plaintiff had judgment.

The only evidence of service of process or papers in the foreclosure case, is contained in the following acknowledgment, endorsed upon the complaint: "We acknowledge service of the above complaint, and waive any other service and notice in the above entitled cause," dated on the sixth day of November, 1856,

and purporting to be signed by the defendants; and this acknowledgment, it is objected, was insufficient to confer jurisdiction upon the Court, as it is unaccompanied with proof of the signatures of the defendants, and a designation of the place where the service was made.

It is well settled, that Courts will take judicial notice of the signatures of their officers, as such; but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the Court can not notice them. (*Litchfield v. Burwell*, 5 Howard Pr. Rep., 346.)

In the foreclosure case, it is to be presumed that such evidence was furnished to the Court before the judgment was rendered. The decree recites that the defendants had been regularly served with process, or had waived service by their acknowledgment. This is sufficient evidence that the requisite proof was produced to establish the genuineness of the signatures of the defendants to their admission. Even if there were no such recitals in the decree, and there was an entire absence of evidence in the record on the point, still the presumption would be in favor of the jurisdiction of the Court, and of the regularity of its proceedings; and, for the want of such evidence, the decree cannot be impeached in this collateral action. (*Cook v. Darling*, 18 Pick., 393; *Crane v. Brannan*, 3 Cal., 192.)

The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken. If the judgment in the foreclosure case was entered prematurely, the remedy of the defendants must be sought by direct proceedings in that action. The decree can not be impeached collaterally on that ground. (*Whitwell v. Barbier*, 7 Cal., 54.)

In this State, the wife can appear in, and defend an action, separately from her husband. To enable her to do so, she must possess, as defendant, all the rights of a *feme sole*, and be able to make as binding admissions in writing, in the action, as other parties.

Judgment affirmed.

## OWENS v. JACKSON.

This State has the right to dispose of the swamp and overflowed lands granted to her by the act of Congress, of September 28, 1850, prior to the issuing of a patent from the United States, so as to convey to the patentee a present title as against a trespasser.

The language of the act of Congress conveyed to the State a present interest in the lands. The description of "Swamp and Overflowed Lands" is sufficient to give the State a present *prima facie* right.

The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive, as between the United States and the State.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

A statement of the facts appears in the opinion of the Court.

*S. C. Hastings* for Appellant.

It is submitted for the appellant Owens that the Court erred because the demurrer admits the land to be swamp and overflowed land; and, as such, granted to the State, by act of Congress of 1850, approved September 28th, which provided that the swamp and overflowed lands "shall be and the same are hereby granted." These are words of present grant.

The Attorney-General of the United States, Mr. Black, has lately decided that, where lands are granted to the State of Iowa to aid in the construction of railroads, upon the selection of the alternate sections, by authority of the State, the fee vests immediately, and the act of Congress operates as a patent, and that a patent from the general government could not add to the title.

The patent under which the appellant holds implies that the State is the owner, and has the right to dispose of the land. No Court has the right to impeach the State's title, nor to presume that the State can act so fraudulently as to make a grant by a patent of a tract of land without some right in the same.

The patent raises a presumption of title.

It is true that this act provides for a patent from the government, and also other acts to be done by officers of the general government. Yet, the character of the lands being fixed as "swamp and overflowed," the title is in the State, so far that the State may control and dispose of them.

The patent to appellant amounts to a contract on the part of the State, that she will claim said land as her own property, and take all the steps necessary to procure a patent from the general government; and that, as between the patentee and any other citizen, the title under the patent shall be sufficient. The statutes provide that subsequently acquired title by a grantor shall enure to the benefit of the grantee. See statute, Wood's Digest,

p. 103, Art. 370, § 33. The State holds the equity, and the patent purports to convey the land to appellant by fee-simple absolute.

The act of Congress, March 2, 1855, vol. 10 Statutes at Large, recognizes the title of the States in swamp and overflowed lands, disposed of by them prior to their being patented to the States. The first proviso of the first section of this act is, "That in all cases where any State, through its constituted authorities, may have sold or disposed of any part or tract of said land to any individual prior to the entry, sale, or location of the same under the laws of the United States, no patent shall be issued by the President for such part or tract of land until the State, through its constituted authorities, shall release its claim thereto." It is further provided that the State, in such cases, shall return a list of the lands so disposed of within ninety days; and, if not so returned, the States may take other lands. While this act provides relief to the purchaser, under the general government, it recognizes the superior right of the State to swamp and overflowed land, and applies, with great force, to this case. Here there is no conflict—no pre-emptor or other purchaser from the general government. The appellant has purchased in good faith from the State. The only questions to be decided, are: 1. Has a State a right to dispose of swamp and overflowed lands, donated by act of Congress, prior to obtaining a patent therefor? 2. Are the premises in controversy such lands? The first question is answered by the act of 1855, March 2d, and authorities cited. And the second question is admitted by the pleadings, and the facts, and the law.

*Whitman & Wells* for Respondents.

No brief on file.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover the possession of land claimed by the plaintiff, under a patent from this State. The land was sold and patented under the provisions of the act of the Legislature, of April 28th, 1855, entitled "An Act to provide for the sale of the Swamp and Overflowed Land belonging to this State." (Wood's Digest, 517.) The defendant demurred to the complaint upon the ground that it did not show that the land had been surveyed and patented to this State. The demurrer was sustained, and the plaintiffs appealed.

The only question necessary to be determined is whether this State had the right to dispose of the swamp and overflowed lands granted to her by the act of Congress, of September 28th, 1850, prior to a patent from the United States, so as to convey to the patentee a present title as against a trespasser.

The first section of the act of Congress provides that "the

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People v. Darrach.

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swamp and overflowed lands" within the State of Arkansas "shall be, and the same are, hereby granted to said State." By the fourth section, the provisions of the act are extended to other States, in which such lands may be situated.

The language of the act is in the present tense "are granted," and conveyed to the State a present interest in the lands. The lands granted are not described in the act by metes and bounds, but are designated by the description of "swamp and overflowed lands." This description is sufficiently certain to give the State a present *prima facie* right.

It is true that the second section of the act of Congress makes provision for the issuing of a patent to the State, "and on that patent the fee-simple to said lands shall vest in the State, subject to the disposal of the Legislature thereof."

But this provision does not conflict with the view we have taken. The act of Congress describes the land, not by specific boundaries, but by its quality; and is a present legislative grant of all the public lands within the State, of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive, as between the United States and the State. (*Summers v. Dickinson*, April Term, 1858.)

Judgment reversed, and the case remanded for further proceedings.

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THE PEOPLE *ex rel.* KIMMEL v. DARRACH.

In counties where the offices of county clerk and county recorder are united, the officer performs the functions of auditor as recorder, and not as clerk.

It follows that where the offices have been separated in a county where they had been previously joined, the recorder becomes auditor.

APPEAL from the District Court of the Fifteenth Judicial District, County of Butte.

This was a proceeding against the defendant, to recover possession of the office of county auditor of the county of Butte.

The defendant was the duly elected and qualified county clerk of the county of Butte, and, by virtue of his office, claimed and exercised the duties of county auditor. The relator, John F. Kimmel, was the duly elected and qualified county recorder of said county, and, by virtue of his office, claimed that he alone, as such recorder, had the right to exercise and discharge the duties of said office of county auditor.

Plaintiff had judgment in the Court below, and defendant appealed.

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Gray v. Garrison.

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*J. D. Barker* for Appellant.

*J. E. N. Lewis* for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The statute uniting the offices of county clerk and county recorder in certain counties, provided that the county clerk, "*as county recorder*, shall be *ex officio* county auditor, until otherwise provided by law."

The act of 1857, "to separate the office of county recorder from the office of county clerk in the county of Butte," provides that "all the duties and liabilities heretofore imposed on the clerk of said county as recorder, shall attach to the officer hereby created," etc.

The duties of auditor were imposed on the county clerk as *recorder*, and we think there is no doubt as to the intention of the Legislature to transfer those duties to the recorder to be elected under the act of 1857.

Judgment affirmed.

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### GRAY v. GARRISON.

An agreement to pay a certain sum of money to a defendant, if he would withdraw his defence to a suit, is assignable, and such assignment gives a right of action in the name of the assignee.

Such assignor is a competent witness in an action by the assignee to recover the amount, as the action is not for an unliquidated demand.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The defendant, Garrison, on or about the 19th day of October, 1854, commenced suit in the Twelfth District Court, against Elias L. Beard and others, for the purpose of foreclosing a mortgage made by said Beard and one Hopkins to the said Garrison, on certain property of Beard and Hopkins in the city of San Francisco. Samuel M. Bowman was made a party defendant in said action, on the ground that he was a judgment-creditor of said Beard's to the amount of \$2,514 60, and that such judgment was a lien upon the mortgaged premises. Bowman filed his answer, setting up various grounds of defence. Subsequently, Joseph B. Crockett, acting as the attorney of Garrison, agreed with Bowman to pay him \$1,250 if he would sign certain stipulations expediting the trial of the case, waiving a jury, and also waiving the defence set up in his answer. Bowman did sign the

stipulation to that effect, and afterwards, Garrison ratified the agreement and promised Bowman to pay the amount.

On the 6th day of May, 1856, Bowman assigned the demand to the plaintiff by an instrument in writing attached to the complaint in this cause.

On the trial, the plaintiff offered as a witness, the assignor, Bowman. Defendant objected to the witness on the ground of incompetency, as being the assignor. The objection was sustained by the Court, and Bowman was not allowed to testify. To which ruling of the Court plaintiff excepted. Defendant had judgment. Plaintiff moved for a new trial, which was denied, and plaintiff appealed to this Court.

*J. B. Hart* for Appellant.

This case presents the simple question, whether the claim sued on can be ranked as a liquidated demand according to the meaning of our statute. Practice Act, § 4.

If it is a liquidated demand, Bowman, the assignor was a proper witness, and to prevent him from testifying was an error. The act prevents an assignor of an account, unliquidated demand, or thing in action, not arising out of the contract, assigned subsequently to the 1st day of July, 1854, from testifying.

But the claim sued on is not an unliquidated demand, and therefore the Court below should have allowed him to testify in the case.

The case of *Easton Allen v. Citizens' Steam Navigation Company*, 6 Cal. Rep., 400, is in point, and upon the authority of that case, I claim that the demand sued on was a liquidated demand, and Bowman, the assignor, was a proper witness, and for this error, the judgment below should be reversed, and the case remanded for new trial.

*Crockett & Page* for Respondent.

The only error assigned in this case is the refusal of the District Court to permit Bowman, the assignor of the plaintiff, to be sworn and examined as a witness on behalf of the plaintiff.

The complaint alleges that the defendant promised to pay Bowman \$1,250 in consideration that Bowman would withdraw certain legal proceedings in which the defendant was interested, and on the trial, Bowman was offered as a witness by the plaintiff and rejected by the Court. He was properly excluded as a witness, for two reasons, to wit:

1. Because he was not competent under the statute, which disqualifies the assignor of "an account, unliquidated demand, or thing in action, not arising out of contract," from being a witness.

The demand sued for in this action is an unliquidated demand, and in every proper legal sense is an "account," and permitting

the assignor to testify in such a case would be precisely within the evil intended to be remedied by the act. This will be apparent from a brief review of our legislation on this subject. The Practice Act of 1851 required every action to be presented in the name of the real party in interest, and did not prohibit the assignor from being a witness. The result was, that a multitude of suits were brought in the name of merely nominal assignees, and the assignors became witnesses, and often the only witnesses to establish the demand.

This led to perjury and gross frauds, which eventually induced the Legislature to prohibit the assignment of "an account, unliquidated demand, or of a thing in action, not arising out of contract." Practice Act, § 4. The Legislature had gone from one extreme to the other; and under this act, the assignee of such demands could not sue in his own name, at all, and without reference to the fact whether or not the assignor was to be a witness to establish the demand. Finding this to be inconvenient in its results, the act of 1855 simply intended to restore to the assignee in all cases the right to sue in his own name; but prohibits the assignor from testifying in support of demands founded on "an account, unliquidated demand, or thing in action, not arising out of contract;" which is precisely the class of demands which, under the act of 1854, could not be assigned at all. The act of 1855 permits them to be assigned, but prohibits the assignor from testifying as a witness to support them. In construing this act, this Court, in the case of *Oliver v. Walsh*, 6 Cal. R., 456, have evinced a most proper determination not to extend its provisions by implication, but to give it effect only so far as the plain language of the act requires.

But it is claimed on behalf of the appellant that the demand sued upon, in the case at bar, is not "an account, unliquidated demand, or thing in action, not arising out of contract," and therefore does not come within the prohibition of the act of 1855. It is said the demand is liquidated, because the complaint avers a promise by the defendant to pay a sum certain. But the answer explicitly denies, not only the promise to pay, but the whole cause of action. Can it be assumed before a trial, and in the face of the positive denial of the answer, that the promise was made, and that the complaint is true? If so there would be no need to call the assignor or any other witnesses, as the plaintiff's demand would be established by a presumption of law, in advance of trial. It is precisely for the reason that the answer denies the promise and the whole cause of action, that the plaintiff finds it necessary to call the assignor to establish it. The mere averment of a promise does not prove it, and in fact the question at issue is whether or not any such promise was made, the demand was not liquidated, and if not liquidated the assignor cannot testify. But the plaintiff proposes to call the assignor to

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prove that it was a liquidated demand, and that the defendant promised to pay it; or, in other words, it is an attempt to establish by the assignor a state of facts, without which the assignor cannot testify in the cause.

In the case at bar, if the answer had admitted the promise and set up matter in avoidance, it is possible the assignor might have been competent, but even then, we think, upon a fair construction of the statute, he ought to have been excluded.

FIELD, J., delivered the opinion of the Court—BURNETT, J., concurring.

The demand in suit was assignable, and its transfer gave a right of action in the name of the assignee. The assignor was a competent witness, and his testimony should have been admitted. The action is not brought for an unliquidated demand, and is not, therefore, embraced within the exception contained in the concluding clause of the fourth section of the Practice Act.

Judgment reversed, and cause remanded.

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### CLAY *et al.* v. WALTON.

Where a defendant entered into a contract with a builder for the construction of a brick house, and the builder applied to the plaintiffs, who were proprietors of a brick-yard, for the sale of the necessary brick, and the defendant said to the proprietors, to induce the sale, that he would become responsible for all the brick furnished his building, and whatever contract or agreement was made with the builder he would see carried out, or would pay for the brick if the builder did not: *Held*, that the promise of the defendant was within the Statute of Frauds.

Such a promise is conditional, and dependent upon the default of another. If there is any doubt as to its import, the Court will look to all the circumstances of the case to ascertain the intention of the parties.

Wherever the leading object of the promisor is not to become surety or guarantor of another, but to subserve some interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another.

But the mere fact that the debt guarantied was for brick to be used in the building of the guarantor does not show such an object in the promise of the guarantor.

The interest which a promisor has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise; and the interest in the principal contract, and the benefit to be derived from it, become matters of consideration only as they may serve to determine that character.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This was an action commenced by J. P. Clay and William Templeton, copartners in business, against the defendant, to re-

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cover the sum of \$2,366 10, for bricks alleged to have been sold and delivered to defendant. Defendant, in his answer, denied the indebtedness as charged in the complaint, and alleged that the bricks were sold and delivered to John S. Williams, with whom the defendant had contracted for the construction of a brick dwelling-house; that Williams by his contract was to furnish all the bricks and materials for said house, and that Williams did furnish such bricks and materials, and that defendant paid him for them as per contract.

On the trial, plaintiffs proved that the bricks were used in the construction of defendant's house; that Williams was about two weeks negotiating with plaintiffs for the purchase of the bricks; that plaintiffs wanted the defendant to become responsible for the bricks, and that Williams so informed the defendant, and he accompanied Williams to plaintiffs' brick-yard, and there the terms upon which plaintiffs were willing to sell the bricks to Williams were repeated over in presence of defendant. Defendant said "he would become responsible for all the brick furnished his building, and whatever contract or agreement was made, that he (defendant) would see carried out, or would pay for them if Williams did not," or words of similar import. The recollection of the witness was not clear, and he did not pretend to state the language or precise words. Nor does it appear whether the promise of defendant preceded or was subsequent to the contract with Williams. After the bricks were delivered, or a portion of them, defendant paid plaintiffs \$500 on account of the bricks, and plaintiffs gave a receipt to Williams for the amount, and Williams receipted to defendant. Williams afterwards paid plaintiffs \$500 more and took a receipt to himself on account of the bricks.

Plaintiffs refused to produce their books on trial, after notice from defendant to do so. It was also proved that plaintiffs had, prior to the institution of this action, commenced suit, by attachment, against Williams, for the same bricks mentioned in their complaint, and garnisheed defendant for the amount due from him to Williams.

This cause was tried before the Judge of the late Superior Court without a jury. Plaintiff had judgment. This Court was subsequently abolished, and the case transferred to the Fourth District Court, where, on motion of the defendant's counsel, a new trial was granted. From the order granting a new trial the plaintiffs appealed.

*Charles Halsey* for Appellants.

On the trial, it was proved that the bricks were used in the respondent's building.

From the testimony of Williams, it appears that he negotiated about a fortnight with Clay for their purchase; that Clay re-

quired Walton to become responsible; that he so informed Walton, who went with him to Clay at his brick-yard, where Williams repeated this; and Clay then wanted or required that Walton should be responsible; whereupon the latter said "he would be responsible for all the brick furnished his building, and whatever contract or agreement was made, he would see carried out, or would pay."

This was in August, 1855. The first delivery of the bricks, as is shown by the complaint, was about the twenty-second of that month.

Williams, on cross-examination, said: "I bought the brick and agreed to pay eleven dollars per thousand, and Walton agreed to pay for them. "Walton said he would be responsible for them, or would pay for them, or would see them paid for, or would see that they were paid for, or would pay for them, if I did not," or words of similar import. I could not vouch for the precise words.

The defence was set up that the bricks were sold and delivered solely on Williams' credit; and that Walton's promise was void by the Statute of Frauds.

This was a disputed question of fact. The evidence was on both sides of it, and the finding of the Judge should be final. 6 Barbour's S. C. Re., 141; 5 Id., 560; 5 Wen. Re., 25, Garder v. Hopkins; 15 Id., 492; 21 Id., 305; 12 Vermont Re., (Sinclair v. Richardson,) 33; Vogan v. Barrier, 1 Cal. Re., 186; Ingraham v. Buffon, 2 Id., 483; Grayson v. Guild, 4 Id., 122.

There was doubt as to what precise words, or which of the different expressions (for they were in the disjunctive and independent of each other) were used by Walton. Doubt as to the sense in which Williams used the words "I bought," etc.; doubt as to the real understanding between the parties whether the bricks were sold and delivered on Walton's or Williams' credit.

The defence was technical or sustainable only by a strict rule of law. The evidence justified a presumption consonant with the equities of the case; and the finding should not have been reversed. Graham on New Trials, 341 to 347, and 388 to 395.

The respondent who set up the Statute of Frauds must show incontestably that his undertaking was such as it contemplated. Darnall v. Tratt, 12 Eng. Com. L. Re., 36.

The real character of Walton's undertaking, is not to be determined by the precise words alone, but upon the whole conversation, then and before; the other facts, the relative situation and circumstances of the three parties, and Walton's subsequent conduct. Chitty on Contracts, 516, 507-8; Rob. on Frauds, 223; 12 Vermont Re., 33; 15 Pick. Re., 160; 5 Wen. Re., 23, and 277; 12 Eng. C. L. Re., 36; 17 John. Re., 114; 6 Alabama Re., 699, Bates v. Starr.

There was enough in the testimony and circumstances to sus-

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tain the inference of an authority from Walton to Williams to contract with Clay that Walton should be primarily responsible, and pay Clay. *Bates v. Starr*, above, in 6 Alabama Re., 697; *Darnall v. Tratt*, 12 Eng. Com. L. Re., 36.

What Walton said authorized Clay to expect that he would pay him. This sufficed to justify the conclusion that the bricks were really sold on Walton's credit. *Tileston v. Nettleton*, 6 Pick. Re., 509.

Again: Walton's undertaking was not collateral, because it did not grow out of the same contract by which Williams, if at all, became liable. *Rob. on Frauds*, 218; and *Buckmyr v. Darnall*, cited there.

But admitting that the sale and delivery were on Williams' credit, still Walton was liable on his undertaking for new considerations distinct from Williams' liability.

Walton would derive the real and immediate benefit by getting materials for his own building. His promise was not merely to pay for property for another's, but his own, benefit.

In nearly if not all of the cases where the verbal promise was held void, the property was for the use of the original debtor. The benefit to Walton emanated from the appellants. 5 Wen. Re., 23 and 277; 9 Pick. Re., 305; 10 New Hampshire Re., 32; 12 Verm. Re., 33; 9 Eng. C. L. Re., *Dixon v. Hatfield*, 471; *Rob. on Frauds*, 228 to 35; *Chitty on Contracts*, 516 and '11.

Walton owed Williams on their contract, or would owe him upon delivery and use of the bricks; and from what had transpired between the three, and their conversation when together, followed by the delivery of the bricks, and their use in Walton's building, there resulted a transfer of Walton's indebtedness to Williams, and the latter's credit with the former from Williams to the appellants. *Farley v. Cleveland*, 4 Cow. R., 432 to 439; *Chitty on Contracts*, 511; *Andrews v. Smith*, and *Towne v. Grover*, 9 Pick. R., 305; *Carnegie v. Morrison*, 2 Metcalf R., 400 to 403.

The subsisting liability of Williams is no objection to a recovery against Walton, according to *Farley v. Cleveland*, and the cases therein cited. 10 New Hampshire, 32.

*Waller & Moore for Respondents.*

The promise of defendant to pay or become responsible for Williams' debt, if any such promise there was, was void under the Statute of Frauds.

"In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, shall be in writing, and subscribed by the party charged therewith." Art. 2. "Every special promise to answer for the debt, default, or miscarriage of another." Comp.

Stat. Cal., p. 200, § 12, "An Act concerning Fraudulent Conveyances and Contracts."

In the case at bar, no such expressed consideration appears. Even taking the testimony of Williams as true to the letter, the promise is void.

Kent's Com., 123; *Manrow v. Durham*, 3 Hill, 384; *Wain v. Walters*, 5 East's Rep., 10; *Sanders v. Wakefield*, 4 Barnw. & Ald., 595; *Jenkins v. Reynolds*, 3 Brod. & Bing., 14. Says Chitty, Contracts, p. 507, "Where there is no previous liability, but the promise of one is the inducement to and chief ground of the credit given to another, such promise is also a collateral undertaking, and within the statute. *Elder v. Warfield*, 7 Har. & J., 391, etc., etc.

A promise to pay the debt of another is within the statute even though made on a sufficient consideration. *Simpson v. Pat-ten*, 4 John, 422; *Gallagher v. Brunel*, 6 Cowen, 346; *Chandler v. Davidson*, 4 Black., 367.

The same is true though made before delivery of goods. 2 Stephens' Nisi Prius, 1284; *Jones v. Cooper*, 1 Com., 227.

Kent, C. J., says, Com., 3 vol., p. 123: "If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral and must be in writing." See, also, *Leland v. Creyon*, M'Cord, 100; *Matson v. Wheream*, 2 J. R., 80; *Anderson v. Hayman*, 1 H. Bl., 120; *Buckmyr v. Darnall*, 2 Ld. Raymond, 1095; *Smith's Mer. Law*, 535; 1 Saunders, 211 (a) note 5th ed.; Chitty Contracts, 507.

The Judge in this case admits that there was "a subsisting liability against Williams." But adds that that fact "would not, according to the case of *Farley v. Cleveland*, 4 Cowen, 432, and the cases there cited, make any difference," "the liability of the defendant being founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the promisor, either from the plaintiff or the original debtor."

The case of *Farley v. Cleveland* is as follows: "Farley sues Cleveland, declaring, specially, that one Moon, on the 22d November, 1815, gave the plaintiff a promissory note with interest payable first of June thereafter. That on January 1, 1817, Cleveland, on consideration of fifteen tons of hay, (value \$150,) sold and delivered by Moon to him, at his instance, promised to pay the note of Moon to Farley." Held, Cleveland was liable to Farley, though Moon's liability continued, Cleveland's promise being "founded on a new and original consideration."

The case at bar is totally different from that of *Farley v. Cleveland*, and wholly wanting in all the elements relied on by Judge Shattuck, to bring it within the ruling of that case.

The alleged promise of defendant, if any such were made, was not founded on any new or fresh consideration, moving from

either plaintiffs, or Williams to Walton, nor does it appear that Walton derived any benefit whatever from it.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The only question in this case for our consideration is whether the promise of the defendant is within the Statute of Frauds. The recollection of Williams of the language used by the defendant is not very clear. He does not pretend to give the precise words, and a slight mistake in this respect might have the effect of changing a promise, intended to be conditional and collateral, into an independent and original undertaking. But, if we assume that the language is accurately repeated by the witness, it is still insufficient to fasten a liability upon the defendant under the statute. It shows only a conditional promise, dependent upon the default of Williams, a promise as surety or guarantor of his contract. And if there be any doubt as to its import, we must look to all the circumstances of the case, to ascertain the intention of the parties at the time. The refusal of the plaintiffs to produce their books at the trial, after notice from the defendant, the form of the receipts for the money paid on account, and the affidavit in the attachment-suit, lead to the conclusion that the sale was made to Williams, and the promise of the defendant was intended to be conditional and dependent upon his default, and was so understood by the parties. It is difficult to perceive in what manner the plaintiffs can avoid the effect of their affidavit in the attachment-suit, as evidence that the contract of sale was made with Williams. No explanation of this affidavit is contained in the record, and the plaintiffs will hardly object that it is taken as true.

It is not clear whether the promise of the defendant preceded, or was subsequent to, the contract with Williams. If it preceded, or if it were concurrent with the principal contract, and constituted the main inducement to the credit given by the plaintiffs to Williams, it would be binding upon the defendant at common law. The consideration moving between the creditors, the plaintiffs, and the principal debtor, Williams, would be sufficient, and it would be immaterial whether the promise were direct and absolute, or conditional and dependent. But, by the twelfth section of our Statute of Frauds, which is borrowed substantially from the fourth section of the English statute of 29 Car. 2, every special promise to answer for the debt, default, or miscarriage of another, is void, unless some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged thereby; and the special promise in this case being to answer for the default of Williams, is directly within the provisions of this section, and is of course void. If the promise of the defendant were subsequent to the

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principal contract, and made as an inducement to its performance by the plaintiffs, it would be equally within the statute. The consideration of the original contract would not attach to the subsequent promise. (*Leonard v. Vredenburg*, 8 John., 29.)

In *Purkett v. Bates*, (4 Ala., 390,) the plaintiff had agreed with one Kelly to construct for him a house, at the usual rate of charges. While the work was progressing, but before its completion, Kelly left the State, and went to Louisiana. The defendant then verbally promised the plaintiff to pay him, if he would proceed and complete the work. It was held, that the promise was collateral, and within the statute. The consideration consisted wholly in the performance, by the plaintiff, of his antecedent contract, and did not arise out of any new and distinct transaction.

It is contended by the appellants, that, admitting the sale and delivery of the brick were made on the credit of Williams, the defendant is still liable upon his promise, because the real and immediate benefit from the transaction was to be received by him, inasmuch as the brick were intended for the construction of his building.

It is well settled, that wherever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another. The general rule is thus stated in *Nelson v. Boynton* (3 Metcalf, 396): "The terms original and collateral promise, though not used in the statute, are convenient enough to distinguish between the cases where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own. The former, whether made before or after, or at the same time with the promise of the principal, is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor." (*Alger v. Scoville*, 6 Gray, 306; 2 Parsons on Contracts, 306, and cases there cited.)

The correctness of the general rule is unquestionable, but it is difficult to see its application to the present case. There is no evidence that the building could not have been erected, and the requisite brick obtained by the contractor, if the defendant had made no promise, or that brick equally good could not have been obtained elsewhere, or that it was of any particular benefit to the defendant that the contract with Williams should have been carried out at all; and even had circumstances of this nature

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appeared in the case, the question would still have arisen, as to what was the leading object and purpose of the promise. The interest which a promisor has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise, and the interest in the principal contract, or the benefit to be gained by its performance, become matters of consideration, only as they may serve to determine that character.

In *Doyle v. White*, (26 Maine, 341,) the plaintiff had agreed to deliver to a builder, stone at a stipulated price, to be used in a dwelling-house, but, previous to the delivery, he informed the defendant of his determination not to deliver the stone upon the credit of the builder; and the defendant thereupon said to the plaintiff: "You bring the rock, and I will see you paid for it." It was held, that the promise was within the Statute of Frauds, and not binding upon the defendant; and that any expectation or hope of profit from the sale of goods by the defendant to the builder, in consequence of his proceeding to construct a house, on being furnished with the rock, did not constitute sufficient consideration for the promise.

We are of opinion that the new trial was properly granted, and the order is affirmed.

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*MARYE v. JONES et al.*

*Naglee v. Minturn*, (8 Cal. R., 540,) affirmed.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This was a bill in equity praying certain set-offs against a promissory note, and that the note be delivered up to the plaintiff, and for judgment against defendants for amount of dividends collected on certain stock deposited as collateral security for the payment of said note, and also for an injunction restraining the transfer of the note, etc.

Plaintiff, G. T. Marye, on the sixth of November, 1854, borrowed of the house of Adams & Co., the sum of \$4,500, payable one month after date, with interest, at three per cent. per month.

To secure this note, one hundred and twenty-two shares of Clay Street Wharf stock, were deposited as collateral security, and transferred by James King of Wm. as trustee. Subse-

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quently King took out new stock, but still issued to him on the face as trustee.

On the twenty-third of February, 1855, an action was commenced by Alvin Adams, against his partners, to dissolve the partnership debts, and Alfred A. Cohen was at the same time appointed receiver.

On the first day of March, 1855, Marye became the owner of certificates of deposit issued by Adams & Co., more than sufficient to pay said note, which certificates were issued prior to the twenty-third of February, 1855.

Marye filed his bill or complaint on November 9, 1855, to redeem his wharf stock, and he allowed in set-off the certificates of deposit held by him.

On the twenty-seventh of February, 1855, I. C. Woods, for himself and partners, applied to the Fourth Judicial District Court for a discharge in bankruptcy under the Insolvent Debtor's Act. The note in this case, by virtue of an order made in that case, was transferred and delivered to Edward Jones, Richard Roman, and Alfred A. Cohen, as assignees. Naglee was appointed receiver, October 2, 1855, and the note was subsequently delivered to him.

Naglee admits the tender of the certificates in payment of the note to Cohen, and demand of the wharf stock.

He claims a balance against Marye, and asks that the wharf stock may be sold to pay it.

The stipulation admits that Adams & Co. were insolvent at the time of the appointment of receiver, but that the same is not alleged in that suit, and that Marye had no notice of it, but that he had notice of the appointment of a receiver.

The stipulation shows that the receiver was appointed by the Court, but that Haskell & Woods consented to the appointment of Cohen.

The case was, by stipulation of counsel, referred to F. A. Sawyer, to report judgment. Sawyer, referee, reported in favor of plaintiff. On motion of defendant's counsel the report of the referee was set aside, and a new trial granted, and the plaintiff appealed.

*V. E. Howard* for Appellant.

The appointment of a receiver by the Court did not change the title to the assets, especially as the complaint did not show insolvency of the firm.

It was an appointment for the benefit of the members of the firm, to which the creditors were not parties.

The receiver could not have brought suit without an order of Court. 5 Blackford, 526.

It was held in the case of *Adams v. Casserly et al.*, that the ap-

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pointment of a receiver before decree of dissolution did not change the title in the partnership property.

In the case of *Cohen et al. v. Barrett et al.*, in 5 Cal. R., the Court pronounced the proceedings in insolvency void, and, of course, no title could rest in the receiver under that appointment.

In the subsequent case of *Naglee v. Minturn*, it was held that the right to the assets did not vest in the creditors, until the dissolution of the partnership by decree of Court and an order for a *pro rata* distribution.

In that case the cross demands were not acquired until July 1855, and yet were allowed in set-off. These decisions have become property rules.

There was no assignment by Woods & Haskell. They merely assented to the appointment of Cohen as a fit person. But that assent fell with the void appointment. No rights accrued under and by virtue of the assent.\* It could not operate an assignment, unless so expressed and intended, and signed by all the partners.

As the facts in this case, it being a chancery suit, are agreed to by the parties and found by the referee, this Court should render such a judgment as the Chancellor should have awarded, and such a judgment as the stipulation contemplates.

The judgment follows, as a matter of course, the report of the referee being confirmed.

TERRY, C. J., delivered the opinion of the Court—FIELD, J., and BURNETT, J., concurring.

The facts disclosed by the record bring this case fully within the principle decided by this Court, in *Naglee v. Minturn*, (8 Cal. R., 540,) and on the authority of that case the judgment is reversed and cause remanded, with directions that the Court below enter judgment upon the report of the referee.

## REYNOLDS v. HARRIS.

No eviction is necessary to enable a vendee to recover back the purchase-money of real estate, where the sale was void under the Statute of Frauds.

Where a party contracts orally for the purchase of a house and lot, and furniture therein, and enters into the possession under such oral agreement, and the vendor subsequently fails to make a conveyance, the vendee has the right to quit the premises, and return the personal property.

A plea of a former suit pending is no bar to an action where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity.

This Court does not deem it necessary to decide whether, in all cases, where a judgment is based upon a complaint which does not state facts sufficient to constitute a cause of action, the judgment itself may be treated as a nullity.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

A statement of the facts appears in the opinion of the Court.

*Charles A. Tuttle* for Appellant.

The appeal is from a judgment, rendered in the Court below, against the appellant, who was defendant therein.

The complaint sets up a verbal contract, to sell real estate to plaintiff made by appellant, and his failure to fulfill the contract, and claims damages therefor, and also judgment for money paid on the contract.

1. The contract was void, and therefore no action can be maintained on it, or for a violation of it. The complaint contains no cause of action. See Cod. L., § 8, p. 200; *Abell v. Calderwood & Johnson*, 4 Cal. R., p. 90; 2 Cal. Rep., p. 603.

2. The finding of the Court does not warrant the judgment, for the following reasons: 1. It does not show that plaintiff ever fulfilled his part of the contract, or that plaintiff was ever ejected from the premises. 2. It does not show that defendant ever refused to convey. 3. The former suit, brought in the same Court, and for the same cause of action, at the January Term, 1856, and in which plaintiff obtained a verdict, was a bar to the maintenance of this suit. See 1 Chitty's Plead., 604; 2 Johns. R., 210.

The arrest of the judgment by the Court, in the former suit, does not prevent its being a bar to the maintenance of this. See 1 Hill's R., p. 656; 2 Johnson's R., 101; 9 Johnson's R., p. 287; 19 Johnson, p. 247; 1 Cowen, p. 142.

*R. Robinson* for Respondent.

This is an action to recover the consideration paid upon a contract not complied with by defendant, and if the contract was void, with greater reason could the consideration be recovered back.

The appeal is taken upon the record alone. There is no statement of the evidence, and the Court will presume that it supported the complaint and findings.

The only point made, to which authorities are cited, is, that there was another suit pending at the time of the commencement of this suit.

This is not true, as a matter of fact, as shown by the record.

The judgment was arrested, and that suit favorably terminated on the 17th day of March, A. D. 1856.

This suit was commenced on the 28th day of March following, being eleven days after that suit was disposed of.

Again, the judgment in that suit was arrested, for the reason that the complaint did not set out facts sufficient to constitute a cause of action.

It was, therefore, no suit, and it is not good in abatement, nor would it be good in bar, if judgment had been for defendant, on a verdict or demurrer.

The authorities do not apply, because the facts, as shown by the record, as amended, show that the judgment was arrested before the bringing of this suit, and, under our practice, an order is a judgment, and is so treated.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The defendant, on the 5th day of December, 1854, verbally agreed with the plaintiff to sell him a house and lot, and certain furniture in the house, for the sum of \$800—\$400 to be paid at the time, and the remainder on the 1st day of June, 1855. The defendant was to make to plaintiff a good and sufficient title to the premises, within thirty days from the date of the agreement. The plaintiff at once took possession of the house, lot, and furniture, with the permission of the defendant. After the expiration of the thirty days, the plaintiff demanded of the defendant a good and sufficient title, stating that he was ready to perform his part of the agreement; but the defendant failed to make the title. The defendant had no title to, but a mortgage upon the premises, which he proceeded to foreclose; and, under the decree, they were sold and purchased by the defendant, but were redeemed within six months by a lawful redemptioner. On or about the 1st day of December, 1855, the redemptioner demanded the possession of the premises of plaintiff, and the plaintiff thereupon left the same. It appeared that the personal property in the house, at the time of the agreement, was of the value of \$200—a portion of which was afterwards, and while in plaintiff's possession, destroyed by fire. On the day of the surrender of the real estate to the redemptioner, personal property, of like character, and of equal value, was deposited in the house by the plaintiff, and the defendant notified of the fact; and that the

same was placed there to be disposed of by him as he might think fit, and that plaintiff relinquished to him all title to the same. During the time the plaintiff occupied the house and lot, he made improvements upon the same to the value of \$300; and the monthly rents were of the value of \$60. Plaintiff demanded of the defendant the money paid by him upon the purchase, but the defendant refused to return the same. This suit was commenced on the 31st of March, 1856. At the January Term, 1856, of the Court, the plaintiff commenced a suit against the defendant for the same cause of action. The case was tried before a jury, and a verdict and judgment were had, at that term, for plaintiff. The defendant moved in arrest of judgment, because the complaint did not state facts sufficient to constitute a cause of action; and the judgment was arrested on the 21st day of April, 1856, and nothing further was done in that case. In the present suit, the defendant plead the pendency of the former suit, in abatement. The judgment in this suit was rendered for the plaintiff, July 22d, 1856, and the defendant appealed.

The first point made by the counsel of defendant is that the plaintiff was never evicted by process of law, and can not, therefore, recover the purchase-money.

In the case of *Norton v. Jackson*, (5 Cal. Rep., 265,) it was held by this Court that an action could not be maintained upon a warranty of title, until eviction by process of law. But the principles laid down in that case do not apply to the circumstances of this. The doctrine laid down in that case was predicated upon a valid, not a void, sale of the real estate. In this case the agreement was void, under the eighth section of the Statute of Frauds. (Wood's D., 106.) No part of the agreement having been reduced to writing, and signed by the party to be charged, the entire agreement was void; and the plaintiff had the right to return the personal property and quit the premises at any time.

The next point made by the counsel of defendant which it is necessary to notice is that the Court below erred in sustaining the present suit, while the former suit was pending and undetermined. This objection is met by the plaintiff's counsel, by insisting that the former suit was not, in contemplation of law, any suit at all, as the complaint was so entirely defective that no judgment could properly be rendered thereon.

It appears from the findings of the Judge, in the former suit, which are made a part of the findings in this, that the suit in that case was brought to recover *damages* for the failure of defendant to make a good title. The complaint in that case was predicated upon the ground that the parol sale was valid and that damages could be recovered for the non-performance of the terms of the agreement. In the complaint there was no allegation that plaintiff had demanded a return of the purchase-money—or that defendant had refused the demand—or that plaintiff had left the

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premises—or that he had ever been disturbed in his possession. The only breach alleged was that defendant had refused to make a good title to the property.

While it is not necessary to decide whether, in all cases where a judgment is based upon a complaint which does not state facts sufficient to constitute a cause of action, the judgment itself may be treated as a nullity, we must hold with the Court below that the complaint in the former suit was so radically defective that the judgment rendered thereon was a nullity; and the pendency of that action could not be pleaded in abatement of the present suit. It is true, as stated by defendant's counsel, that the plaintiff could have amended his complaint in that case, under proper circumstances. The judgment was had in January; and the motion in arrest was taken under advisement until April 21st, when the judgment was arrested. The plaintiff could not, therefore, amend his complaint until after the commencement of the present suit, March 31st. If he had amended the complaint in that case, it could not have been done without the special leave of the Court; and, when amended, the defendant could have pleaded the pendency of the present, in abatement of that suit.

Judgment affirmed.

### MYERS v. ENGLISH, STATE TREASURER.

The provisions of section fifteen of article six of the Constitution, respecting the salaries of District Judges, do not exempt those officers from the necessity of an appropriation for that purpose by the Legislature.

The power of controlling and disposing of the revenue of the State, is vested by the Constitution in the Legislature.

It is within the legitimate power of the Judiciary to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means and no power to avoid the effects of *non-action*.

The provision of the Constitution which prohibits the passage of any law impairing the obligation of contracts, relates solely to contracts between individuals, and not to contracts between individuals and the State.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

This was an application to the Court below for a writ of *mandamus* against the defendant, to compel him, as State Treasurer, to pay certain warrants drawn by the Comptroller, prior to the first day of January, 1857, for the payment of portions of the salaries of District Judges, accruing in 1856.

An order to show cause why the writ should not be issued, was made against the defendant. In obedience to said order, the defendant filed his answer, and alleged as cause, as follows:

1. That the warrants were issued for indebtedness which ac-

erued prior to the first day of January, 1857, and by the provisions of the second section of the act of April 21, 1856, the Treasurer was and is prohibited from paying warrants issued for indebtedness of the State which accrued prior to that period.

2. That no provision was made by law for the payment of these warrants, and at the time of their issuance, the State was indebted more than the sum of \$300,000, and that the debts of plaintiff were not within the exceptions of the Constitution of this State. There was money in the treasury applicable to the payment of the warrants.

The Court below refused to grant the *mandamus*, and the plaintiff appealed to this Court.

*W. S. Long* for Appellant.

Was the Treasurer bound to pay these warrants when they were presented to him? The Court's attention is respectfully called to the fact, that nearly every one of these warrants were drawn for the payment of the Judges' salaries. The office of Judge is not established simply by act of the Legislature, but the Constitution itself has established it, and it will not certainly be contended that when the framers of our Constitution established these offices, that they intended the Judges to perform the important, responsible, and laborious duties of their offices without pay. And no one will contend that the office of Judge would be filled at all, if there was no pay attached to it. The Legislature certainly could not, by any act that it could pass, abolish the offices of Judges of the Supreme Court or District Judges. Yet it is contended that the Legislature can refuse to pay the Judges anything for their services, and thus do that indirectly, which they can not do directly. For who supposes the Judges in the State would hold their offices without some compensation for their services. They would be forced to quit the bench—no Courts would be held in the State, and the wheels of the entire government would at once be stopped. Has the Legislature the power to pass any act, the operation of which will bring about such results? We say they have not, and therefore that the act of the Legislature, prohibiting the Treasurer from paying these warrants, is unconstitutional and void.

The money was in the treasury at the time these warrants were drawn; it had been collected from the people, and was paid into the treasury by them expressly for the purposes of paying the expenses of the government, and the Legislature had no right to keep it in the vaults, but were bound to appropriate and have it paid to those to whom it belongs. And the Legislature did, on the fifteenth day of March, 1856, pass an act making an appropriation for the payment of these warrants. See Statutes of 1856, p. 45.

This Court has already said, in the case of *Laforge v. McGee*,

that when the money is in the treasury, the holder of the warrants has a lien on it, and the Legislature has no right or power to take it from him. Yet it is contended in this case, notwithstanding the money was in the treasury, and that it had been appropriated to the payment of our warrants; that the Legislature can afterwards pass an act preventing us from receiving the money and compelling us to take bonds instead.

We contend that the act to fund the indebtedness of the State, passed April 19, 1857, is unconstitutional and void for another reason, to wit: Because it authorizes the issue of State bonds, when the State is already in debt above her constitutional limit; therefore, no act of the Legislature could authorize the Treasurer or any one else to issue the State's bonds for any sum whatever. If we are correct in this proposition, then the general appropriation stands in full force, and the money being in the treasury at the time our warrants were presented for payment, the Treasurer was bound to pay them. But it is said the issuing of our warrants was illegal, because it was creating an indebtedness against this State. The simple answer to this is, that the money was in the treasury for the payment of the warrants at the time that it was drawn, and, therefore, it was making no debt against the State. The Comptroller's warrant is simply the authority for the Treasurer to pay the money, and certainly does not become a debt or liability against the State until the payment is refused.

*Heydenfeldt* made similar points on behalf of Appellant.

*Volney E. Howard* filed the following brief on the part of the Appellant.

1. The fifteenth section of the sixth article of the Constitution provides that "the Judges of the Supreme and District Courts, shall severally, during their continuance in office, receive for their services a compensation, to be paid out of the treasury," etc. Wood's Digest, 34. This section was intended to make the Judges preferred creditors, for the wise purpose of securing their independence in office. They are to be paid out of the treasury during the period of their office. They are also to be paid at stated times, a compensation, which can not be increased or diminished during their respective terms of office. The amount of the salary, and the terms of payment existing by statute at the time of the election, become parts of the contract between the State and the officer; and the Legislature have no more right to say that the Judge shall be paid at different periods, in something else than cash, than to reduce the amount of the salary. Any provision that retards or accelerates the period of performance, impairs the obligation of the contract. Story on the Constitution, 250, *et seq.* That the law existing at the time

of the contract, enters into and becomes a part of it, is a principle firmly established. *McCracken v. Haywood*, 2 How., 612.

2. The office being created by the fundamental law, and the amount of salary and time of payment fixed by the statute, the Constitution makes the appropriation as soon as the money comes into the treasury. The words "shall receive," have been held an appropriation. *Thomas v. Owens*, 4 Maryland, 189.

3. There was a specific appropriation for the payment of the salaries covered by these warrants. The act of March 15, 1856, appropriates \$50,000 for the salaries of the District Judges. The act of April, 1857, appropriates \$25,000. And the act for the fiscal year of 1858, appropriates \$55,000. We submit that the Legislature had no power to divert the fund which, by force of the appropriation, had thus become the money and property of the officer who had earned the salary.

4. It is said that the Treasurer is justified in refusing to pay these warrants, because the Funding Act postpones all creditors, and requires them to receive bonds, etc. In the first place, it is submitted that the warrants do not come within the act, because the case admits funds in the treasury liable to and sufficient for their payment. That of April 21, 1856, applies to the warrant only, "if there should be no funds or money in the treasury applicable to the payment of the same." We say, therefore, the Treasurer has refused payment in his own wrong, by refusing to apply a fund specifically appropriated.

That this application is not a suit against the State, but a proceeding against the officer to compel him to perform a ministerial duty enjoined by the law.

We submit that the act of April 21, 1856, does not specifically include the Judges of the District Court, and that an act will never be so construed as to impair the obligation of a contract, or divest a vested right. *Thorne v. San Francisco*, 4 Cal., 127.

5. Again, if the Legislature had intended to include the Judges, the act would have been void, as impairing the obligation of the contract. And that this inhibition of the Federal and State Constitutions, applies as well to contracts of States as of individuals. That the leading cases arose on contracts of States. *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 ib., 164; *Green v. Diddle*, 8 Wheaton; *Dartmouth College v. Woodam*, 4 ib.

The amount involved in this case is not large, but it must determine whether the Legislature shall have the power to control the judiciary, by compelling the Judges to receive anything else than gold and silver; and instead of being paid during the term of office, to receive paper payable ten years after the term. The construction contended for by the Treasurer would destroy the value of the provisions thrown around the judiciary by the Constitution, and place the Judges in a condition of dependence upon the legislative departments.

*Jas. L. English*, Respondent, in person.

I hardly know what to say on behalf of the respondent, further than is contained in my answer in the case.

1. It is admitted that the warrants mentioned in plaintiff's complaint, were all issued for indebtedness which accrued prior to January 1, 1857, and that being the case, the Treasurer is expressly prohibited by the second section of the Act of April 21, 1856, from paying them. See Acts of 1856, p. 230, § 2.

The appellant says, however, that this act is unconstitutional, because it makes that a debt, which was not a debt before. What he means by this, I do not know, unless he means to imply that the issuance of the Comptroller's warrant is the creation of a debt—but in this he is simply mistaken, for the debt was contracted before, and the Comptroller's warrant is simply the means by which payment is obtained of a debt previously contracted. It is plain, then, that the act does not make that a debt, which was not a debt before. And the appellant being mistaken in his premises his conclusion inevitably falls. The act is constitutional, for the Legislature unquestionably possesses the power to direct the disposition of the moneys of the State.

2. It is admitted that at the time of the issuance of the warrants the State was indebted more than \$300,000, and that none of the warrants were issued for indebtedness within the exceptions of the Constitution.

This being the case, if no provision is made by law for their payment, as I allege, they cannot be paid. The appellant shows no provision of law for their payment, whilst, on the contrary, I show an express provision that they shall not be paid. And here I would especially call the attention of the Court to the fact that the warrants mentioned in the complaint, were drawn months after the passage of the Act of April 21, 1856, by which it was proved that no such warrants should be paid.

3. I refused to pay the warrants because there was in the treasury no money legally applicable to the payment of those warrants.

The plaintiff below proved that there was in the treasury in general fund, about \$165,000, on the fifteenth day of March, 1856, and that enough of this money to pay his warrants, remained in the treasury on the third of January, 1857, when payment of the warrants was demanded and refused.

I say that none of this money was legally applicable to the payment of these warrants, because of the prohibition contained in the second section of the act of April 21, 1856, already cited.

The appellant however contends that because the Legislature made an appropriation against which these warrants were drawn, he is entitled to be paid. But if that gives him a right to be paid, then each of the \$500,000 of warrants still outstanding must be also paid, for they are all drawn against appropriations.

Indeed, the Constitution of the State provides, that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." Constitution of State, Art. 4, § 23.

The appellant appears to entertain the erroneous impression which generally prevails, that an appropriation is a setting apart of so much money in the treasury, to pay certain debts, whereas, the appropriations are almost always made when there is not a dollar in the treasury to meet them. So that the fact that the warrants are drawn against an appropriation, gives them no right to be paid.

The appellant, however, contends that, because there was \$165,000 in the treasury at the time of the appropriation, against which his warrants were drawn, (the total appropriation amounted to \$604,000,) and money enough to pay his warrants at the time they were drawn, therefore he has a lien upon the money. What gives him a lien? What gives him a preference over the holders of the five hundred thousand dollars of Comptroller's warrants still outstanding? He has no lien; he is entitled to no preference. They are all upon an equality.

[This case was originally argued and decided at the January Term, 1858, and the following opinion was delivered at the April Term, on a re-hearing. The first opinion is not given, for the reason that the present decision covers all the points determined in the former, and the points raised are more elaborately discussed. Both opinions were rendered by the same Judges.

REPORTER.]

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This case was decided at the January Term, and on account of the great importance of the principle involved, a re-argument was had, and the subject ably discussed by the learned counsel for the plaintiff.

The fifteenth section of the sixth article of the Constitution of this State provides that the Judges of the Supreme and District Courts shall, severally, at stated times during their continuance in office, receive for their services a compensation, to be paid out of the treasury, which shall not be increased or diminished during the time for which they shall have been elected.

It is insisted by the learned counsel for the plaintiff that this provision of the Constitution, taken in connection with the statute fixing, *in advance*, the amount of the salary of a Judge, and the *stated times* at which that salary shall be paid, is, in fact, an appropriation of so much money in the treasury for that purpose; and that, therefore, no further appropriation is required by act of the Legislature, nor can that body defeat the payment

of the prior appropriation made by the Constitution, so long as there is any money coming into the treasury.

The twenty-first section of the fifth article contains the same provision, in reference to the salaries of the Governor and other officers of the Executive department, except that it is not stated in so many words, that the salaries shall be paid out of the treasury. The twenty-fourth section of the fourth article provides that: "The members of the Legislature shall receive for their services a compensation, to be fixed by law, and paid out of the public treasury; but no increase of the compensation shall take effect during the term for which the members of either house shall have been elected.

The only difference between this clause and those relating to the compensation of the Judges and executive officers, is, that the compensation of members of the Legislature cannot be *increased*, while it may be *diminished*, during the term. But this difference cannot constitute any distinction in these provisions, in reference to the question of prior constitutional appropriation. We can see no difference in the principle involved. If the Constitution, taken in connection with the statute fixing the amount of the salary of a Judge, and the stated times at which it must be paid, makes the appropriation for the payment of the salary, then it does the same thing for the compensation of the officers of the executive department, and of members of the Legislature. The provision of the Constitution is substantially the same in reference to these classes of officers. The amount of the compensation is fixed by prior law, and unchangeable, by subsequent act, (except as before stated,) in all the cases; and the fact of appropriation, by the Constitution itself, must exist as to all, or none. It is true that the provision in reference to the compensation of the executive officers does not state that the same shall be "paid out of the treasury;" but this is the palpable meaning, and this omission is fully supplied by other provisions of the Constitution.

If these views be correct, and there is no substantial difference in the cases stated, and the appropriation by the Constitution, if it exist at all, applies to all, or none, then it follows that no legislative appropriation would be necessary for much the larger portion of the ordinary and regular State expenses. That provision of the Constitution which says no money shall be drawn from the treasury but in consequence of appropriations made by law, would then be comparatively useless.

But if the position contended for by the able counsel of plaintiff be true, then it would, in principle, equally apply to other cases. As for example: where an office is created by the Legislature, and the salary fixed at a specific sum, payable at stated times, no subsequent appropriation by the Legislature would be required, so long as the law creating the office remains un-

changed. The legislative will, having been already constitutionally expressed, that the office shall exist, that the officer shall be paid a given sum at stated times, what use could there be in making any express appropriation, in *this* case, if such appropriation can be dispensed with in *any* case? An act of the Legislature, passed in pursuance of the Constitution, is as much the will of the people as a constitutional provision itself. The only difference between the two cases is, that they are *changeable* in different *modes*; but so long as they remain unchanged, they are equally the expressions of the public will, in the contemplation of our theory.

But if we concede the principle contended for to be true, for the sake of the argument only, then it presents very serious difficulties in reference to its practical application. It must be evident that if we could suppose that the legislative department should be so partial and unjust as to withhold the necessary appropriations for the judiciary, while the *other* officers of the State were paid their fixed salaries, it could only be upon the ground of hostility to this department, and a desire to bend its decisions to the views of the Legislature. If that body desired to accomplish this end, it would not seek to do this by withholding the pay of District Judges, but would withhold the appropriation for the salaries of members of this Court. In such a case, how could we enforce our demands upon the State Treasurer? We could not decide in our own cases, and the Constitution has made no provision for the appointment of special Justices. If, on the other hand, the Judges were placed on an equality with the other officers of the Government, and the same appropriations made as to all, then there could be no just complaint, on the ground of partiality or prejudice. So long as we are all placed upon an equal footing we must be content. And to suppose that the Legislature would make so partial and unfair a distinction against this department, and in violation of its plain duty, is to suppose that which has happened but seldom in the history of our country.

The learned counsel for the plaintiff has referred us to the decision of the Court of Appeals of the State of Maryland, in the case of *Thomas v. Owen*, (4 Maryland R., 190.)

The Constitution of Maryland specified the amount of the annual salary of the officer; and there is, therefore, this difference between the two cases. But we think it must be conceded that the decision is a case in point, and sustains, fully, the position taken, notwithstanding this difference. The principle involved is the same. The decision of the Court upon this point was unanimous, all the four Judges concurring.

The Chief Justice, in delivering the opinion of the Court, says:

“An opposite interpretation would countenance this paradox,

that a co-ordinate branch of the government could stop its whole machinery by refusing to pay the salaries of those upon whom is devolved the discharge of the duties of the other branches."

It is very true that the Legislature possesses the power to stop the whole machinery of government, whenever it is willing to take the responsibility of doing so. That body might repeal all the existing laws, and leave the people of the State practically without government for a time. So the Legislature, under the Constitution of this State, at one session, can fix the compensation of members at the succeeding session; and this compensation, though merely nominal, cannot be increased by the incoming Legislature. The Legislature has the power to repeal all existing revenue laws, and thus leave the State treasury without funds. The Legislature has also the power of taxation to the extent of the value of all the property in the State.

But, with all due deference to the learned and distinguished jurists who decided the case of *Thomas v. Owen*, we are compelled to arrive at a different conclusion. We think the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature. It is a very delicate and responsible trust, and if not used properly by the Legislature at one session, the people will be certain to send to the next more discreet and faithful servants.

It is within the legitimate power of the judiciary, to declare the *action* of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of *non-action*. The Legislature being the creative element in the system, its action cannot be quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil. It is a discretion specially confided by the Constitution to the body possessing the power of taxation. There may arise exigencies, in the progress of human affairs, when the first moneys in the treasury would be required for more pressing emergencies, and when it would be absolutely necessary to delay the ordinary appropriations for salaries. We must trust to the good faith and integrity of all the departments. Power must be placed somewhere, and confidence reposed in some one.

The learned counsel for the plaintiff insists that we erred in the former opinion, in saying, "That provision of the State Constitution which prohibits the passage of any law impairing the obligation of contracts, relates solely to contracts between *individuals*, not to contracts between individuals and the State."

The learned counsel has referred us to several leading cases, and among them to the case of *Fletcher v. Peck*, (6 Cranch, 87.) The decision of the Supreme Court of the United States, upon a constitutional point, is binding and conclusive upon this Court.

But while this is true, the reason given for the decision we are at liberty to doubt.

In that case, Chief Justice Marshall says :

"The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant."

With the utmost deference for the opinion of the distinguished jurist, I am compelled to doubt whether he placed the decision upon the proper ground. I concede that a grant is an executed contract ; but, with due respect, I submit that it has no existing obligation to be impaired. It has accomplished all that the parties intended, and therefore the obligation has ceased. The obligation of an executed contract is an element that *was*, and is not. The executed grant accomplished two *finished* purposes.

1. The extinguishment of the title of the grantor.

2. The vesting of the title in the grantee. These two purposes being accomplished, the grantor has no more right to the thing granted, than he has to other property, to which he *never* had any title. But this want of *present* right does not arise from the *estoppel* of the grant, but because the *title in fact* passed from the grantor to the grantee. The title, by the grant, was extinguished in one, and vested in the other party. "An estoppel," says Lord Coke, "is when a man is concluded by his own act or acceptance, to say the *truth*." And when A conveys land to B by a *valid* conveyance, he is not allowed to reclaim the estate because he is estopped, but because he has no *existing* title to it. Estoppels being odious, because they will not permit a man to speak the truth, the law will not base a conclusion upon that ground, when it can find a sufficient ground that is consistent with the truth. The distinguished Chief Justice says, very truly :

"Conveyances have been made ; those conveyances have vested legal estates, and, if these estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact."

Now, I can see no difference, in principle, between the right of the State to seize property she has once validly conveyed, and her right to seize property to which she *never* had any title. The question is as to her *existing* title, not as to the title she once had. If she has no existing title, then the seizure is a pure violation of vested rights ; and whether those rights became vested by her act, or by the act of another, they are equally vested and equally protected, because they are vested rights. A man may have a vested interest in property that he never acquired by an executed contract ; and still he is protected as well as if he had so

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acquired it. I cannot see why the Legislature should be prohibited from taking the property of an individual because he purchased of the State, while the property of another individual is not thus exempt, because he acquired it by his own labor. And if the latter is protected by the Constitution, it must be upon a principle equally applicable to the first; that is, upon the ground of *vested right*, and not upon the ground that the obligation of the contract would be impaired.

Under the views we take we still adhere to the position stated in the former opinion. That provision of the Constitution refers to contracts between individuals. It could not refer to contracts between individuals and the State, because the State cannot be sued. The provision is general, and must embrace *executory* contracts; and, therefore, if it was intended to apply to the State at all, it must have embraced those contracts that have obligations to be impaired.

We must adhere to our former decision.

Judgment affirmed.

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A Judge can revoke his certificate to a settled statement on appeal, during the term at which the judgment was rendered; but after the term has expired, it cannot be done. While the term lasts, the Court has power to amend the record. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. The settled statement, until certified, is not record.

Where the Judge of the Superior Court certified to an engrossed statement, and subsequently revoked his certificate and ordered the statement to be made conformable to this later settlement, which order was not entered on record; and the Judge of the Fourth District Court, to which the cause was transferred, ordered that the order of revocation and amendment be entered *nunc pro tunc*, there being no record evidence on which to base such an order: *Held*, to be error.

Motion to set aside the submission of the case to this Court on the record.

This case was tried in the Court below, and the statement settled by the referee appointed by the Court for that purpose, and the statement, as settled, ordered to be engrossed. When engrossed by the attorney of appellant, it was certified to be correct by the Judge of the Superior Court, and filed with the clerk. The counsel for respondent afterwards moved the Court to strike the engrossed statement from the record, for the reason that it was untrue, and contained matters not included in the settled statement. On the hearing of the motion, the Judge revoked his certificate to the engrossed statement, and ordered that the

statement should be made conformable to the settled statement. This order was not entered in the record, nor is it certain that it was in writing; but if in writing, it was lost or mislaid. The Judge of the Fourth District Court, after the cases pending in the Superior Court had been transferred to that Court under the provisions of the act of the Legislature, made an order directing the order made by the Judge of the Superior Court, revoking his certificate to the correctness of the statement, to be entered *nunc pro tunc*.

*Shepherd* for Plaintiffs.

*Hubert* for Defendant.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The first question presented is, whether the Judge can afterwards set aside or revoke his certificate to the correctness of the statement.

We think that he may do so during the term of the Court at which the judgment was rendered. But after the time has expired, it cannot be done. The statement, when filed, becomes a matter of record. While the term lasts, the Court has power to amend the record. After the term has passed, the record can not be amended, unless there is something in the record to amend by. The settled statement, until certified, is not record.

The second question is, whether the order of the Fourth District Court was proper. The only evidence of the order made by the Judge of the Superior Court, revoking his certificate to the correctness of the engrossed statement, was found in the recollection of the Judge, and of the counsel. This was not sufficient. Had the order been made in writing, and signed by the Judge, and simply omitted to be entered on the minutes, then the order *nunc pro tunc* would have been proper.

The correct rule would seem to be this: That during the term the record may be amended in any manner so as to be made conformable to the facts. But when the term is past, it can only be amended in cases where the record itself shows the error. In such case, there must be record evidence to amend by. (3 Cal. Rep., 255; 7 Marshall's Ky. Rep., 237.)

For these reasons, the motion is denied.

## SUPREME COURT—APRIL TERM, 18

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### BRANGER & DRIARD v. CHEVALIER.

It is not error in a Court to refuse to give to the jury an instruction which embraces a question which came properly before the Court, and not before the jury.

In a chancery case, it is doubtful whether the refusal to give instructions to the jury, even conceding them to be correct, can be assigned as error.

An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the phrase "errors excepted."

Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake, in some cases; but this can only be done when the gross error affects all the items of the transaction. When the clear mistake affects only a portion of the items of the stated account, it will be permitted to stand, except in so far as it can be impugned by the party alleging the error.

And when the party, who seeks to go behind the stated account, goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand.

A plaintiff must be confined to the allegations in his complaint.

An order of reference cannot go beyond the pleadings of the parties.

When the referee excludes proper or admits improper evidence, or does any other act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report.

But when the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report, and for a new trial.

Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent upon the face of the record.

#### APPEAL from the Superior Court of the City of San Francisco.

This was a bill in equity filed by the plaintiffs against the defendant for the purpose of having an account stated, signed by the plaintiffs and defendants, set aside on the ground of fraudulent concealment of facts and misrepresentations on the part of the defendant.

About the first of January, 1853, the plaintiffs and defendant entered into copartnership for the transaction of business in real estate, etc., which continued from that time until the 17th of May, 1855, when it was dissolved.

On the 31st of August, 1854, a mutual accounting was had of their copartnership affairs, and an account was stated and signed by the respective partners in triplicate, showing, at that time, a net balance, due by the plaintiffs to the defendant of \$4,314 81.

On the 14th of October, 1854, the plaintiffs executed and delivered to the defendant a mortgage of certain real estate, to secure the payment of the aforesaid balance on settled account of \$4,314 81, with interest thereon at one-half per cent. per month.

This mortgage is charged to have been given by the plaintiffs through mistake, and without just consideration.

The plaintiffs pray that the mortgage may be declared to be

void, and be delivered up to be canceled—that the defendant may be enjoined from proceeding to enforce it—that the stated account may be annulled, and an account taken *de novo* of the whole partnership business—that a judgment may be rendered against the defendant in the sum of \$30,000, which is alleged to be the true balance due to the plaintiffs; and for other and further relief.

The answer admits the formation and duration of the partnership as alleged in the bill; and the settlement of accounts in August, 1854; also, the giving of the mortgage in October, 1854, and it sets forth another settlement which was had about the same time.

It denies specifically, all the fraud, concealment, and misrepresentation charged in the bill against the defendant.

It alleges that the stated account was settled and signed after due deliberation and with full knowledge, on the part of the plaintiffs of the true character of the several items contained in it, and that it is fair and correct.

Upon this state of the pleadings, the cause was called for trial; and a jury was empaneled and sworn, to whom certain issues, in the form of questions, were presented for their determination, as follows:

1. Is the settlement of accounts, signed by the parties on the 31st of August, 1854, founded on either mistake or fraud?
2. Is there a mistake in charging or crediting items in said account, so as to make a false or unfair account?
3. Was the mortgage from the plaintiffs to the defendant dated on the 14th day of October, 1854, given by mistake of facts on the part of the plaintiffs, or obtained by fraud or circumvention of the defendant?
4. Was it, or not, to secure the payment of a supposed balance due the defendant from plaintiffs?

The defendant asked the Court to charge the jury as follows:

1. That in cases of fraud the proof thereof must be positive.
2. Where each party is equally innocent, and there is no concealment of facts which the other has a right to know, and no surprise or imposition is proven, the mistake or ignorance, whether mutual or *unilateral*, will not entitle the plaintiff to a verdict.

Which charges, the judge refused to make, on the ground that they were "good as abstract law, but not relative to the issue."

To the first question, the jury answered that the settlement of accounts of the 31st of August, 1854, was founded on "mistake."

To the third, they answered that the mortgage was given by "mistake of facts."

And to the fourth, they answered the mortgage was given

to secure the balance of the accounts of the 31st of August, 1854.

After this verdict, the Court granted a decretal order, annulling the stated account, re-opening the whole matter, and referring it to E. D. Sawyer, Esq., to take and state an account of all the copartnership affairs between the parties, from the commencement to the close: and likewise enjoining the defendant from disposing of the mortgage or taking any steps to foreclose the same.

This decretal order was afterwards amended, so as to require the referee to find and report upon all issues raised by the pleadings, necessary for a just determination of the case.

On the 12th of June, 1856, the referee filed his report, in which he stated a balance, as due by the defendant to the plaintiffs, in the sum of \$1,042 85.

The report of the referee was excepted to, but the exceptions were disallowed; a motion for a new trial was overruled, a final decree was granted, 15th Sept., 1856, and defendant appealed to this Court.

*N. Hubert* for Appellant.

Mr. Hubert filed a printed brief, discussing the facts of the case, at considerable length.

*Sloan & Hartman*, on behalf of the Appellant, made the following argument:

I contend that there is error in the decretal order, as far, at least, as it annuls the stated account of August, 1854, and directs the whole account to be taken and stated *de novo*—because:

First, it was not warranted by the pleadings; second it was not warranted by the verdict of the jury; third, it was not authorized by the facts and circumstances of the case.

1. If the bill makes a case for relief at all, as to the stated account, it cannot properly be extended beyond the right to surcharge and falsify.

The answer of the defendant sets up and insists upon the stated account, as if specially pleaded.

The bill, it is true, alleges fraud on the part of the defendant, and prays that the whole settlement may be annulled. But it is also true that it undertakes particularly to specify the various items which it is charged were improperly and erroneously entered there to the debit of the plaintiffs. And I insist that these items alone, if erroneous, should have been subjected to judicial investigation; that the account as stated should have been allowed to stand, with liberty to the plaintiffs to surcharge and falsify as to those particular items only, upon clear proof of mistake or error.

The rule is thus stated by a modern text writer:

"In some cases, where a stated account is impeached, the Court will re-open the whole, and direct it to be taken *de novo*. In others, where it is faulty in a less degree, it will allow it to stand, with liberty to falsify and surcharge. This leaves it in full force as a stated account, except so far as it could be impugned by the opposing party. If he shows the omission of a credit, that is a surcharge; if he shows the insertion of an improper charge, that is a falsification." Adam's Equity, marginal pp. 226, 227, (top pp. 428, 429.)

Where the charges in the bill are specific, setting forth the items of the account, with their dates, which are alleged to be erroneous, on a reference for an account, the inquiry is not open beyond the special matters charged, although the bill may contain a general charge at the conclusion, and a prayer for "a full account concerning the premises." *Consequa v. Fanning*, 3 J. Ch. R., 587.

2. The jury, by their verdict, negative the charges of fraud entirely. They only find that there was some mistake.

The doctrine that settled accounts shall not be set aside but for fraud, is as well established in Courts of Equity as that they shall not be surcharged or falsified but for error. *Chambers v. Gladwin*, 9 Ves., 265.

3. There are no facts or circumstances in the case which would seem to justify the Court below in annulling the settlement, and ordering the whole copartnership account to be taken *de novo*.

The decretal order was not warranted by the verdict.

The response of the jury, to the interrogatories of the Court, was, "that the mortgage was given by mistake of facts." Thus it will be seen that, by their verdict, they negative the charges of fraud entirely. They only find that there was some mistake.

The doctrine that settled accounts shall not be set aside but for fraud, is as well established in Courts of Equity, as that they shall not be surcharged or falsified but for error. *Chambers v. Gladwin*, 9 Ves., 265.

There are no facts or circumstances in the case which would seem to justify the Court below in annulling the settlement, and ordering the whole copartnership account to be taken *de novo*.

"I take it for granted," says Chancellor Kent, "that the order for a reference must be founded upon the pleadings and proofs, and that it cannot be made more extensive than the *allegata* and *probata* of the parties." *Consequa v. Fanning*, 3 J. Ch. R., 595.

I further contend that the stated account of the 31st of August, 1854, and which was afterwards solemnly ratified by the making and delivery of the mortgage, should have been permitted to stand wholly untouched; and that the reference should have been limited to a statement of the partnership affairs from that time until the dissolution of the firm.

The account of the 31st of August, 1854, was agreed to and signed by all the parties concerned; it was, therefore, a stated account, in the highest sense of the term.

But it is said by the respondents, that the words "errors and omissions excepted," were annexed to the account so signed by the parties.

If this were so, it could not have altered the rights of the respective parties, or impaired the legal efficacy of the settlement, without destroying it altogether.

It was, in fact and in law, a settlement, and was so intended to be. And the reservation of exceptions to any errors and omissions there might be, did not nor could not diminish its efficacy, nor add anything to the legal right of the parties to it.

The circumstance that a settled account was signed with the exception of errors, has been held to make no difference; "that being always implied in the settlement of an account." (See note of a case, under that of *Taylor v. Haylin*, 2 Bro. Ch. R., marginal p. 311,—top pp. 245, 246.)

The practice of opening accounts which have been adjusted by the parties themselves, who could best understand them, is not to be encouraged; and it should never be done upon an allegation of error supported by doubtful, or even probable testimony only, where no fraud has been practiced by one party on the other. *Wilde v. Jenkins*, 4 Paige, 495.

In the case of *Chapdelaine v. Dechanau*, 4 Cranch, 309, the defendant interposed a stated account by a plea in bar to a similar bill. In pronouncing the opinion of the Court, Chief Justice Marshall said, "that the plea in bar must be sustained, except so far as it may be in the power of the 'plaintiff' to show clearly that errors have been committed, is a proposition about which no member of the Court has doubted for an instant. No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful, or by only probable testimony." If the referee had been limited to the pointing out of particular errors in the respective items mentioned in the bill, he would have been wholly unable to detect any.

Instead of that, however, the referee is ordered to go into the whole copartnership account, complicated as it undoubtedly was, and probably kept in such a manner as only to be clearly understood by the partners themselves. The result was as might have been expected; with all the care and skill the referee could bestow. And it is one which should never have been hazarded by the decree of the Court, except upon a clear case of fraud.

But where there has been no misrepresentation or concealment of facts, and each party has an equal opportunity of knowing all about the account, even if there be some mistakes, it furnishes no ground for relief. It is better that a settled account

should be allowed to remain so, than that unimportant errors, innocently made, should be subjected to expensive litigation. This principle is clearly laid down in the case of *Belt v. Mehen*, 2 Cal., 159.

That, like this, was an action to correct an alleged fraud and mistakes in the settlement of a partnership account. The Court below found that there had been a mistake but no fraud, and rendered a decree dismissing the complaint.

The referee did not report upon the matters submitted by the decretal order as amended. Under the former rules of practice, in such cases, it would not have been regular to refer to the master anything more than the taking and stating of the account. The Chancellor previously determined whether a proper case had been made; and usually settled the principles upon which it was to be taken.

Under our statute, I suppose it would be competent for the Court to refer the whole case. If that was properly done, the referee should have reported upon the issues so submitted, and pressed upon his consideration by the defendant's attorney.

On the other hand, if the Court was bound to determine first whether a proper case had been made for annulling the settlement and restating the whole account, and the Court sought information through the verdict of the jury, it is difficult to see upon what ground the Court refused to charge the jury as asked by the defendant.

They could not go into the account. They could only inform the conscience of the Court as to the question, whether there had been such fraudulent conduct on the part of the defendant as would justify the annulment of the stated account. This was necessarily, to some extent, a mixed question of law and fact; and in that view it is insisted that the charge was applicable and should have been given. So, if it was properly left to the jury to decide whether there has been any misapprehensions or mistakes, it was also proper that they should have been instructed touching the character of mistake or misapprehension which the law permits to be the subject of judicial investigation.

*P. W. Shephard* for Respondent.

1. That although the *onus probandi* was on plaintiff to show error in the stated account of the thirty-first of August, 1854, and the defendant might have confined plaintiffs strictly to those errors proved alone, yet defendant by his own act, in consenting to the opening of the whole account, and submitting the same to the referee, is estopped from now claiming this to be error, for he cannot charge error in the Appellate Court, of which he did not avail himself in the Court below. *Morgan v. Hugg*, 5 Cal. R., 509; *Davis v. Cayuga* and *Susquehanna R. R. Co.*, 10 How. P. R., 330.

2. That by consenting to the issues presented to the jury, as framed by the Court, defendant is estopped from charging error, in the refusal of the Judge to charge as prayed for by defendant, if the charge prayed for was not applicable particularly to those instructions.

3. That if there was error in the refusal of the Judge to charge the Jury as prayed for, yet defendant waived the same by consenting to open the account and submit to a reference on them.

4. That the report of the referee can only be set aside for fraud, or gross error of law or fact apparent on its face. *Tyson v. Wells*, 2 Cal. R., 122; *Muldrow v. Norris*, ib., 77; *Porter v. Blandry*, ib., 72; *Goodrich et al. v. City of Marysville*, 5 Cal. R., 430.

5. That although a motion was made in the Court below for a new trial, yet the statement was not settled by the Judge or referee, and not agreed to by counsel, nor are the affidavits and counter-affidavits made on said motion furnished by appellant to this Court. *Linn v. Twist*, 3 Cal. R., 89; *Haley v. Young*, 4 Cal. R., 284.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

In January, 1853, the parties entered into partnership, and on the thirty-first of August, 1854, a stated account, in triplicate, was signed by them, from which it appeared that plaintiffs were indebted to the defendant in the sum of \$4,315—to secure the payment of which, the plaintiffs executed to defendant a mortgage, dated and delivered the fourteenth of October, 1854. The partnership continued until May, 1855, when it was dissolved. In August, 1855, plaintiffs filed their bill against defendant, alleging that they were induced to sign the stated account, by the fraud and false representations of defendant, and that the account was fraudulent and false. They then specify certain items in the account as being incorrect, and pray that the stated account may be decreed to be null and void, and that an account may be taken of all the partnership transactions, and for general relief. The defendant answered, denying all fraud on his part, and all error in the stated account, and conceded that the Court might grant any proper relief for settling up the partnership transactions occurring since the date of the mortgage. In the Court below, the plaintiffs had a decree, from which the defendant appealed.

The first error assigned by the defendant is, that the Court erred in refusing to give certain instructions, offered by the defendant.

There were certain special questions prepared under the direction of the Court, and with the consent of the parties, which were submitted to the jury. Conceding these points to have

been correct, there was no error in refusing to give the second instruction asked for, as it had no relevancy to the question submitted to the jury. This instruction embraced a question which came properly before the Court, and not before the jury. The refusal to give the first instruction asked by defendant did not injure him, as the finding of the jury was in his favor upon the point embraced in it. Even conceding that the instructions had been proper, it is matter of doubt whether the refusal to give them, in a chancery case, could be assigned as error.

The next point made by the defendant, which it is material to notice, is, that the Court erred in the decretal order, so far as it annulled the stated accounts, and directed an account to be taken of all the partnership transactions *de novo*.

In answer to this objection, the learned counsel for the plaintiffs insists that this error, if any, was waived by the consent of the parties that the stated account might be set aside. If this consent had been given, it would seem to have amounted to a clear waiver of the objection. But upon an examination of the record, we can not find sufficient evidence to sustain the ground taken by the plaintiffs' counsel. It is true, that in the order appearing on page twenty-three of the record, and purporting to have been made on the twenty-ninth of October, 1855, it is left doubtful whether the consent was given to the questions submitted to the jury, or to the setting aside the stated account. But this ambiguity is cleared up by the final decree, appearing on page fifty-four, wherein it is stated that "the following special issues having been prepared by the Court, with the consent and approval of the counsel of the respective parties," setting out the issues and the answers of the jury; and then proceeding to recite, "and in pursuance of said special verdict, the Court having by its interlocutory order, dated the twenty-seventh day of October, 1855, and by its further and amended interlocutory order, dated the sixth day of December, 1855, directed that the accounts stated between the said parties, dated the thirty-first day of August, 1854, should be opened and set aside." The ambiguity is also removed by the interlocutory order signed by the Judge, and dated the twenty-seventh of October, 1855, appearing in the statement on page seventy-six of the record. The consent of the defendant, if it so appeared, to the appointment of a particular person as referee, could not be construed as consenting to the order setting aside the stated account.

There can be no question as to the fact that the account of August 31, 1854, was a stated account, although the phrase "errors excepted" was added at the bottom. "An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted." (Story's E. J., § 526.)

In this case, though fraud was charged, the jury found only

mistake, and this was the ground upon which the decretal order of the Court was made.

In the case of *Chambers v. Goldwin*, (9 Ves. Jr., 264,) it was held by Lord Eldon that "accounts *settled* shall not be set aside but for fraud, or surcharged and falsified but for error." But in reference to accounts *stated*, the rule does not seem to be quite so strict. Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake, in some cases. (Story's E. J., §523.) But this can only be done when the gross error affects all the items of the transaction. In case the clear mistake only affects a portion of the items of the stated account, it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. And when the party who seeks to go behind the stated account, goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand. (Story's E. J., §523; Collyer on Part., §573, note 5; Adams E., 227 and note; 3 John. C. R., 587.)

In this case certain errors were specified in the complaint, and the plaintiff should have been confined to the items mentioned. The order of reference cannot go beyond the pleadings of the parties; and then the mistake should be clear and material before the Court could allow the party even to surcharge and falsify. It is a very dangerous practice to go behind stated accounts, especially as between partners, who alone understand their complicated affairs, and the mode in which their books are kept. If all partnership books were well and carefully kept, upon the same system, then the practice of opening up accounts would not be so doubtful. (4 Cranch, 308; 4 Paige, 495.)

The bill in the case of *Consequa v. Fanning* (3 John. C. R., 587) was very similar to the complaint in this; and it was there held that the inquiry could not extend beyond the items specified, although the bill prayed for a full account.

The counsel of defendant have specified certain alleged errors in the report of the referee. It appears that, after the settlement of the thirty-first August, 1854, one Chamon executed a mortgage to Chevalier, to secure the payment of \$5,267 32, of which the referee states, in his report, (record, page 26,) that the sum of \$1,538 43 belonged to the firm, while the statement, (record, page 308,) states that \$3,728 87 of the sum of \$5,267 32 belonged to the firm, and the remainder to Chevalier. By the terms of the mortgage, Chevalier was empowered to collect the rents of certain leased property belonging to Chamon, and to appropriate *monthly* \$650 thereof, as follows: 1, interest to S. Moss; 2, the interest on the \$5,267 32; 3, the accruing rents; 4, the taxes; and, 5, the surplus, if any, to the extinguishment of the mortgage. As the *agent* of Chamon, Chevalier had collected the gross sum of \$2,315, from which should be deducted whatever sum

Chevalier had paid out of it for Chamon to *others*, not including the firm; and then whatever net sum Chevalier received *for the firm*, should have been charged to him. To ascertain the sum collected and retained by Chevalier for the firm, the interest received on the \$5,267 32 should have been apportioned between him and the firm, in proportion to the amount due to each. But, in the account of Driard and Branger with the firm, they are credited with several items, (on pages 205 and 207 of the record,) as having been received by Chevalier from Chamon, amounting in all to the sum of \$2,561 48; and the same items are charged to Chevalier in his account with the firm, (record, pages 176 and 178.) From the account rendered by Chevalier as to the amounts collected by him of Chamon, there was only the sum of \$1,244 remaining in his hands as the property of the firm; the other portion of the \$2,315 having been paid to others, according to the terms of the mortgage. This sum of \$1,244 was subject to distribution among the partners. Instead of which Chevalier is charged with a larger sum than the whole gross amount received by him from Chamon, and is not allowed any credits for payments made to others for Chamon. This would seem to be error. There may be some entry in some other portion of the accounts correcting this mistake, but we have been unable to find it, if there be such; and it has not been pointed out by the counsel on either side.

It is insisted by the counsel for plaintiffs that if there be error in the report of the referee, the defendant has not taken the proper method of bringing it before the Court. The testimony is contained in the report of the referee, and properly certified by him. When the referee excludes proper testimony, or admits improper evidence, or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. But when the alleged error consists in the final conclusions of law or fact drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report, and for a new trial. This was done in this case. It is true that the statement on the motion for a new trial was not settled by the Judge. The statement was made by the attorney for defendant, and proposed amendments filed by the attorney of plaintiffs; and nothing further was done in reference to it, as appears from the record. In such a case the attorney of defendant must be held as consenting to the amendments, and both parties as agreeing to the statement as amended. It is also true that the affidavits used upon the hearing of the motion for a new trial are not set forth in the record. The only effect of this omission is to deprive the defendant of all ground of error based upon the affida-

vits; but the omission does not affect his right to raise the question as to errors apparent upon the face of the report itself.

There is nothing in the record to show what was the testimony before the jury; and we must presume that it was sufficient to warrant their conclusion that there was a mistake in the stated account of the thirty-first of August, 1854.

Our conclusion is, that the Court erred in setting aside the stated account and directing an account to be taken *de novo*. We also think that the report of the referee, in reference to transactions since the date of the mortgage, was erroneous in some particulars, and should have been set aside.

For these reasons the judgment is reversed, and the cause remanded for further proceedings.

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### COFFEE v. MEIGGS *et al.*

Where from the nature of the contract it is not practicable to ascertain the amount of damages sustained by a breach of contract, the measure is the price agreed to be paid.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

A statement of the facts appears in the opinion of the Court.

*S. M. Bowman* for Appellant.

The plaintiff made no proof of the value of the work done, nor for any damages sustained. He cannot claim the whole contract price. Sedgwick on Damages, 222; *Clark v. Mayer*, 4 Com., 338; *Freeman v. Clute*, Barb. S. Ct., 424; *Marston v. The Mayor of Brooklyn*, 7 Hill, 73. *Reynolds v. Jordan*, 6 Cal. R., 108, is in point.

*John Satterlee* for Respondent.

The only point really in this case, is the rule of damages laid down by the Court. In such a case as this, the rule or measure of damages is the price agreed to be paid.

The contract was not to build a steam-engine or boiler of certain materials and certain capacity, the cost and expenses of which any builder of engines and boilers, or competent engineer, could exactly estimate. It was not to build a steam-boat of certain dimensions and materials, the cost of which any ship-carpenter could exactly ascertain. It was not to build a house according to certain plans and specifications, which any

architect or house-builder could accurately calculate, but it was "to make such alterations and repairs in the steamer *Resolute* as he (the plaintiff) might deem necessary, so as to make the boat and boiler and engine perform in a certain manner." If he could succeed in accomplishing the object aimed at, within six days from the date of the contract, the defendants were to pay him one thousand dollars. If he failed, he was to "forfeit all claims for services and materials."

It is impossible for anybody to tell what it would have cost plaintiff to perform the work—impossible to tell what profits he could have made. Only a part of his plan of alterations was disclosed; only a part of what he intended to do was done. So far as he went, his alterations were an improvement. Nobody can tell but that when his men stopped work, he had made all the alterations and repairs which he intended to make, except what he intended to perform with his own hands. The alterations and repairs contemplated by the plaintiff, he was not bound to disclose. That was his secret. His skill, knowledge, and experience, were his capital upon which he relied, and took his risk.

Indeed, he was not bound to prove that he could have succeeded. He was entitled to the opportunity to try.

There is, therefore, no mode of ascertaining the damages of the plaintiff, except by adopting the contract price as the measure. See Judge Norton's opinion in this case; 1 Labatt's Dist. Court Reports, p. 248; see, also, particularly *Baldwin v. Bennett*, 4 California Rep., 392; see, also, *Byrd v. Boyd*, 4 McCord, 246.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., and FIELD, J., concurring.

Plaintiff was employed by defendants to make certain alterations on a steam-engine, defendants agreeing, in the event that a certain result was attained by such alterations, they would pay the plaintiff one thousand dollars; plaintiff to forfeit all compensation for labor or materials if the alterations did not produce the desired result.

The nature and extent of the alterations were left entirely to the option of plaintiff.

In the progress of the work, plaintiff attempted to remove a certain copper pipe belonging to the engine, for the purpose of making alterations in it, but was prevented by defendant; plaintiff then abandoned the work.

Plaintiff had judgment below for the full amount named in the contract, and defendants appealed.

In *Baldwin v. Bennett*, 4 Cal., 392, it was held that where, from the nature of the contract, it is not practicable to ascertain the amount of damages sustained by a breach of contract, the measure is the price agreed to be paid.

In this case, it is impossible to arrive at the precise amount of damage sustained by plaintiff; if the nature, extent, and probable cost of the alterations contemplated by him were known, then the measure would be the difference between such cost and price agreed to be paid. But as there was no evidence on this point, the rule adopted by the Court below was the only one applicable to the contract.

Judgment affirmed.

**McMILLAN v. RICHARDS *et al.*—PEOPLE *ex rel.* McMILLAN v. VISCHER, SHERIFF OF MARIN CO.—McMILLAN v. HYATT *et al.***

The settled doctrine of equity now is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal and the land the incident; that the mortgage constitutes simply a lien or incumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage.

This equitable doctrine has been adopted in this State, and asserted, directly or indirectly, in repeated instances by this Court.

The mortgage being a mere security for a debt, it must follow, that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage.

The original character of mortgages has undergone a change. They have ceased to be conveyances except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They pass no estate in the lands, but are mere securities; and default in the payment of the money secured does not change their character.

Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England, and in several of the States, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this State can in no case become the owner of the mortgaged premises except by purchase upon sale under judicial decree consummated by conveyance.

A foreclosure suit by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises, for its satisfaction, the surplus, if any, going to subsequent incumbrancers or the owner of the premises, and execution following for any deficiency.

The statutory right of redemption is equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law.

The estate of a mortgagor and of a judgment-debtor after sale, stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption, is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it.

The decisions as to the estate of the judgment-debtor after sale become, therefore, authorities for determining the estate of the mortgagor after sale under the decree; and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment-debtor, and that the conveyance when executed will take effect, in the one case, from the date of the mortgage, as it does in the other from the time the lien of the judgment attached.

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McMillan v. Richards.

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It follows, that a creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem.

Such lien and right to redeem would be lost, where a prior judgment had been obtained by a third party against the mortgagor, under which his estate subject to the mortgage had been sold, and the time for redemption had elapsed, and a conveyance had been executed.

The legal estate exists in the judgment-debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser.

The purchaser at an execution-sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him he has the same right as successor in interest to the debtor or mortgagor.

A redemption of property sold under a decree of foreclosure is accomplished, by payment, under protest, of the amount claimed to be due by the sheriff, though certain portions claimed are disputed.

The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal. It is notice, only, to the party receiving the payment, that, if the demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion.

Nor will the subsequent institution of suits by attachment and injunction to obtain and secure the repayment of the amount alleged to have been overpaid in the redemption, destroy the operative effect of the payment as a redemption.

Where money has been placed on general deposit in a bank, and negotiable certificates of deposit have been issued to the depositor for the amount, there is nothing left in the possession of the bankers belonging to the depositor, upon which an attachment issued against his property can fasten. The bankers, by their certificates, become liable, not to refund to the depositor the specific money deposited, but to pay its amount to the holder of the certificates, whoever he may be, on their presentation.

Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiffs' use. The words "had and received to the plaintiffs' use," are put as the consideration upon which to support the *assumpsit* on the part of the defendant.

Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section 232 of the Practice Act, can be commenced in the county where the relator resides; the provision of the statute that actions against a public officer for *acts done* by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty.

The proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* can not determine these rights, or in any respect affect the interests of third parties.

APPEALS from the District Courts of the Seventh and Twelfth Judicial Districts, Counties of Marin and San Francisco.

These three cases were argued together, as they all grew out of the same transaction. The first of the actions was ejectment, brought by plaintiff against defendants, to recover a tract of land in Marin county, tried before the District Court without a jury. The Court rendered a decision in favor of defendants, against

plaintiff, whereon judgment was entered. The plaintiff appealed from the judgment, upon the facts as found by the District Court, by which it appeared as follows :

Both parties claimed to derive title to the premises from Antonio M. Osio. On the fifth day of December, 1851, Osio was indebted to George W. Bird, by a promissory note, made by Osio, payable to Bird, bearing interest at five per cent. per month.

To secure the payment of this note, with interest, Osio mortgaged to Bird the premises in controversy. Bird assigned the note and mortgage to Jonathan Edwards, and Edwards assigned them to Thomas G. Cary. The mortgage and the assignments were duly recorded in the office of the county recorder of Marin county.

After the note and mortgage were executed and delivered, and before the foreclosure of the mortgage, Osio sold and conveyed the premises mortgaged to Andrew Randall. In September, 1853, Cary commenced an action for the recovery of the amount due on said note, and to foreclose the mortgage. Osio and Randall were the parties defendants in such action. On the fourth of December, 1854, it was ascertained and adjudged that there was due on the note \$8,400, and \$295 costs, and a decree was then entered for the sale of the premises, and the application of the proceeds of the sale to the payment of the amount found due. The decree contained a clause barring and foreclosing the equity of redemption of said Osio and Randall, and all persons claiming by, through, or under them, or either of them, in and to said mortgaged premises, subsequent to the commencement of the action. From this judgment and decree, Randall appealed to the Supreme Court. At the April Term, 1856, the appeal was dismissed, with twenty per cent. damages.

On the fourteenth of June, 1856, the premises were sold as directed by the decree, and purchased by said Cary, for \$16,000, leaving due him a balance on the judgment. On November 18, 1854, Jesse Smith recovered a judgment in the District Court of the Fourth District against said Randall. A transcript of the docket of this judgment, duly authenticated, was filed in the recorder's office of Marin county, on the twentieth of February, 1855. Execution was issued on the Smith judgment, and on the twelfth of March, 1855, Randall's interest in the premises was sold to the defendant Richards for \$2,000, and certificates of sale issued. On the ninth of February, 1856, no one having redeemed, the sheriff executed a conveyance to Richards.

On the thirtieth day of January, 1855, McMillan recovered a judgment against Randall in the Fourth District Court, a transcript of the docket of which was filed in the recorder's office of Marin county, on the seventh day of February, 1855.

On the twenty-first of July, 1855, McMillan recovered another judgment against Randall in the Twelfth Judicial District Court,

a transcript of which was immediately thereafter filed in the same recorder's office.

On the twelfth of January, 1856, an execution was issued on the first of McMillan's judgments, and the interest of said Randall in said premises was sold on such execution, on the seventeenth of March, 1856, to McMillan, for \$2,000, and a certificate of sale issued; and no one having redeemed, the sheriff, on the twenty-sixth of December, 1856, executed a deed to McMillan.

On the twelfth of December, 1856, McMillan, with his attorney, Mr. Shafter, presented himself before the sheriff of Marin county, claiming to redeem the premises, from the sale made under the said decree of foreclosure, by virtue of his judgments against Randall, which he claimed were liens on the property; and requested the sheriff to make up the amount necessary to redeem; at the same time serving upon the sheriff a notice of redemption, accompanied with his affidavit of the amount due upon said judgments, and duly certified copies of their dockets. After some objection, the sheriff consented to make up the amount; and on the day following, when called on again, he reported the amount at \$24,146 08. What then took place is thus stated in the testimony of the sheriff on the trial:

"Mr. Shafter said that was too much; that the amount required would not amount to seventeen thousand dollars, but he would pay whatever sum I demanded, and insisted I should name the amount. He paid me the amount, twenty-four thousand one hundred and forty-six dollars and eight cents; he protested against paying the amount; said it was too much; it was at the same time, in the office; he requested me to give a statement of the items, as I figured it up; there was a written protest served at the time Shafter asked me for the certificate; I think he prepared the certificate; I signed it; Shafter told me probably that was not the end of the matter, and requested me to deposit at Garrison & Co.'s, to save the interest during the litigation. About one week after, I deposited a portion with Tallant & Wilde, and a portion with Parrott & Co. \* \* I mean by protest, only that he said the sum was too much. The written protest was after I had counted the money, and found it correct. I read the certificate and signed it; can't say whether certificate was executed before protest or after. \* \* I knew it to be correct. I selected my own bankers; Shafter advised me as to Parrott. There was no arrangement about the money. Shafter said a portion of the money was borrowed of Garrison & Co."

The written notice of protest, referred to in the testimony of the sheriff, specified the items to which objection was made. After the payment as described above, and at the same interview, the plaintiff requested the sheriff to deposit the money with Messrs. Garrison & Co., bankers at San Francisco, assigning as a reason that a part of the same had been loaned by them

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at two per cent. a month, and would probably be tied up by litigation for several months, and by such deposit the interest could be provided for. On the twentieth of December, the sheriff proceeded to San Francisco, from Marin county, and deposited a portion of the money with Tallant & Wilde, and a portion with Parrott & Co., receiving certificates of deposit for the same.

McMillan, whilst the sheriff was in San Francisco, commenced an action in the District Court of the Twelfth District, against him, for the recovery of \$10,000, as for money had and received by the sheriff, to and for the use of McMillan, and according to the finding of the Court, "caused the money so deposited to be attached in the hands of the bankers to satisfy any judgment which he might recover in the action," and which "money remained so attached at the commencement and trial" of this action.

On the 17th of February, 1857, McMillan, as plaintiff, commenced an action on the equity side of the Court, against John G. Hyatt, (the assignee of the certificate of sale, executed to said Cary, and the assignee also of the balance due by the decree after the sale on the foreclosure,) and against the sheriff Vischer, and the bankers with whom he had deposited the money, and others, as defendants; and in such action the plaintiff sued out an injunction enjoining said Vischer from negotiating, or transferring, or in anywise disposing of said certificates of deposit, and enjoining the said bankers from paying the certificates of deposit. McMillan claimed, and stated by his complaint in such action, verified by his oath, that the sum of \$6,700, paid to the sheriff, was not due and payable as a portion necessary for the redemption aforesaid, and that the sheriff had no right to have the same; and prayed that a receiver might be appointed to take the custody of the said certificates of deposit, for the purposes of that suit, and to invest the funds pending the litigation—that an account might be taken of the money paid under protest, and that the excess over and above the true amount essential in law to effect a redemption might be decreed to be paid to the plaintiff, with all interest accruing thereon. To the complaint a demurrer was filed and sustained.

The Court found as a fact that of the sum of \$24,146 08, paid to the sheriff, only the sum of \$17,606 87 operated as a legal payment for the purpose of the redemption, and that the same was insufficient therefor.

On the 19th day of January, 1857, the said sheriff of Marin county executed his deed of the premises to John G. Hyatt, in virtue of said sale under said decree. The defendants claimed under this deed, and were in possession of the premises at the commencement of the action.

The case of *The People ex rel. McMillan v. Vischer*, sheriff, etc., was a proceeding by *mandamus* instituted in the Twelfth

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District Court to compel Vischer, as sheriff, to execute a deed of the same premises to the relator, to which he alleged himself entitled by virtue of his redemption.

The facts in the three cases sufficiently appear in the above statement, and in the opinion of the Court.

*Heydenfeldt & Shafter* for Appellant, in the ejectment-suit.

The general question is, whether the facts found support the judgment.

The title of the plaintiff depends upon the validity of the redemption of December 13, 1856.

To the validity of the redemption it is essential that Hyatt should have had a redeemable interest; that McMillan should have been a redemptioner; that an amount of money sufficient to effect the redemption, should have been paid to a party authorized to receive it for that purpose; and, that such payment should have been made within the time limited by law.

1. Hyatt had a redeemable interest.

The decree was in ordinary form, and Hyatt's interest was that of an assignee of the certificate given to the purchaser at the sale on the Cary decree, June 14th, 1856. Practice Act, § 229.

2. McMillan was a redemptioner.

To this position, however, the following objections are taken :

First objection.—Randall, the debtor in McMillan's judgment, had merely an equity of redemption in the land, and an equity of redemption cannot be subjected to the lien of a judgment.

This objection, however tenable at common law, is of no avail under our system. Practice Act, § 260; *Kent v. Laffan*, 2 Cal. Rep., 295; *Godeffroy v. Caldwell*, 2 Cal. Rep., 492; *Johnson v. Dopkins*, 3 Cal. Rep., 391; *Middleton v. Guy*, 5 Cal. Rep.; *Harlan v. Smith*, 6 Cal. Rep.; *Waters v. Stewart*, 1 Caine's Cases, 65; 4 Johns., 40; 6 Johns., 290.

If the law was otherwise, then by the device of mortgaging his land for a small sum, a debtor might put his estate beyond the reach of his creditors.

Second objection.—But admitting that an equity of redemption may be the subject-matter of a judgment lien, still McMillan's judgment was not a lien on the particular equity of redemption in question.

Under this head we have the following specifications :

1. The transcript of the large judgment of McMillan was not filed in Marin county (Feb. 7, 1855,) until after the Cary decree, (Dec. 4, 1854,) and that decree foreclosed or ended the title of Randall the moment it was entered.

Answer.—Assuming the correctness of this view, then when Cary comes to sell, June 14, 1856, he is put in the position of a

creditor selling his own estate for the payment of his debt, which is absurd.

The foreclosure was not effected by the decree. That consummation could be wrought out only by the decree, the sale in pursuance of it, the lapse of time, and a sheriff's deed. *Van Rensselaer v. Sheriff*, 1 Cow., 502; *Pollard v. Taylor*, 13 Alabama R., 604.

2. McMillan had no judgment-lien, for he became the purchaser at his own sale, March 17, 1856.

Answer.—His judgment amounted to \$21,000, his bid \$2,000, and his judgment continued to be a lien for the balance. *Prac. Act*, § 231; *Vandyke v. Herman*, 3 Cal., 295.

The cases cited by the respondents, 8 Johns., 332; 1 Hill, 110; 4 Cow., 133, are of no avail, for they all proceed upon a positive provision of the New York statute, and the point in *Vandyke's* case is not presented in any of them.

See the opinion of the Court in *Ex parte Paddock*, 4 Hill, 544.

In the discussions at the bar, the counsel of the respondents disclaimed all intention of disputing the correctness of the decision in *Vandyke v. Herman*.

In any event, the decision should be adhered to until the rule shall be changed by the Legislature.

For an exposition of the rule *stare decisis*, see 2 Green. Cruise, p. 543, note.

3. But conceding that McMillan had a continuing lien for his balance, the counsel for the respondents insist that he could not use that lien as the basis of redemption.

The statute (*Prac. Act*, § 230,) goes upon a *status*.

He who has a "lien" "may redeem" by force of it. *Vandyke's* case establishes a lien in McMillan, and the statute provides that he might put it to the particular use in question. The two things cannot be disassociated, for they are joined together by positive enactment.

4. McMillan had no lien, for by his purchase and the lapse of the six months he became the owner of the land.

Answer.—The objection does not go to the right of redemption, but to the particular capacity in which McMillan undertook to exercise the right.

But McMillan did not become the owner of the land on the grounds named. At the date of his redemption, (Dec. 13, 1856,) he had not taken a deed from the sheriff. *Van Rensselaer v. Sheriff*, 1 Cow., 502; *Ex parte Peru Iron Company*, 7 Cow., 540; *Bissell v. Payn*, 20 Johns., 3; *Smith v. Colvin*, 17 Barb., 157; *Comp. Stats.*, 513, § 1.

This view is fully justified by the common law of forfeiture. The party in whose favor the forfeiture had accrued was always at liberty to claim it or waive it in his election. And his intention to claim the forfeited right was required to be manifested by

appropriate conduct. If a grantor claimed an estate on the ground of a breach of condition, if a landlord would end a term for non-payment of rent, entry or re-entry was essential; and forfeited franchises did not return to the sovereign until after there had been a judgment of forfeiture procured at his instance.

3. A sum of money was paid to the party entitled to receive it, and sufficient in amount to effect the redemption.

It appears distinctly, from the record, that McMillan "paid" the sheriff, on the 13th of December, \$21,146 08, but under "protest that it was too much."

It appears that the sheriff was requested to deposit the money with Garrison & Co., but it is further found that the sheriff refused to comply with the request, and the request was not made until after payment was made.

It is found that there was no arrangement about the money between the sheriff and McMillan, or any one representing him.

And it is found as a fact, that the sheriff "selected his own bankers."

In view of these findings the respondents are not at liberty to argue that the payment, after all, was "conditional," or that the money was left on "deposit," or that the sheriff received the money, not as sheriff, but under an "agency" or "employment," for all these hypotheses are in conflict with the findings that the money was "paid," and without any "arrangement." Vischer could not have received the money as McMillan's agent, except under an arrangement to that effect, nor could the money have been paid to him on condition, unless there had been an arrangement raising the condition.

Nor are the respondents at liberty to argue that McMillan did not "intend" to pay. The question of *intention* was an open one at the trial, and was, it is to be presumed, fully investigated by the Court, in the light of all the facts and circumstances raising presumptions on the point. The subsequent garnishment and injunction had to do with this question of fact, and it is to be presumed that all due weight was allowed them. But on all the proofs, the Court has found that the money was "paid under protest," and "without any arrangement." This is, in effect, a finding that the party intended to pay under protest—that is, that he intended to do what he did in fact—and the respondents are not at liberty to allege that McMillan did not intend to pay it at all or in any sense.

There are four questions, however, fairly presented by the record in this connection: the effect of the protest upon the payment; the effect of the garnishment upon it; the effect of the injunction, and the effect of the sheriff's deed to McMillan, December 26, 1856.

As to the protest. It did not affect the validity of the payment.

The only purpose of protest in any case, is to rescue the payment from the imputation of being voluntary, and beyond that it has, and can have no effect whatever.

There is no case in England or America, in which the position has ever been taken, that a protest vitiates the payment. In fact "protest" is a term unknown to the common law. The point that a protest avoids a payment is made here for the first time.

In 2 Sand. Superior Court Reps., 481, *Fleetwood v. City*, it was held that "the legal effect of the payment was not impaired by the protest made."

In *Ex parte Newall*, 4 Hill, 589, the redemptioner did not confine himself to a verbal or written protest even, but resorted to the extreme measure of injunction, and still without prejudice to the payment.

But it is insisted by the respondents that if the payment is allowed to stand as such, when made under protest, it would operate as an extension of the time within which the party is to ascertain the amount due, and in which to pay it absolutely.

Now, we admit that the payment must be made within the six months, and we further admit that the payment must be absolute, that is, it must not be a conditional payment, but we deny that protest makes a payment conditional, or in any manner detracts from its absoluteness, in so far as the payment is made necessarily. Its only purpose and effect is to conserve to the party the right of recovering back the excess. The action of the protest is confined to the excess. It is limited to that as its subject-matter. Then, as all but the excess is paid absolutely, as it is gone without the possibility of recall, there is no occasion for an extension of the time of payment, and, indeed, such extension is impossible. The time for doing an act cannot be extended after the act has once been done.

The objection in question might have been urged in 4 Hill, 589, as well as here, and it is directly opposed to the case in 2 Sand, 481, and is founded in an entire misapprehension of the purpose and effect of a protest.

As to the garnishment. It did not impair the payment by legal effect. It was not a recaption of the money. The action was money had and received. It counted upon an indebtedness—went upon the relation of creditor and debtor, and not upon an allegation that McMillan had a present property interest in any money specifically sued for—the money "had and received," was put merely as the consideration on which to raise an *assumpsit* on the part of Vischer. The garnishment involves no assertion of title, for in the theory of garnishment, the funds garnisheed are regarded as the property of the debtor in the

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hands of third persons. The garnishment was not a recaption, for prior to the attachment, and now, the funds are in the custody of the law.

But an effect which has been denied to an injunction cannot be claimed for a mere garnishment 4 Hill, 589.

As to the injunction. The payment having once been accomplished, its effect was not impaired by the subsequent injunction. This was the exact question made and decided in *Ex parte Newall*. 4 Hill, 589.

The effect of the deed to McMillan, December 26, 1856. The counsel for respondents insist that the deed in question operated as an abandonment or waiver of the redemption.

Answer.—After redemption from the Cary sale and lien, McMillan had a clear, unmistakable statute right to a deed in pursuance of his purchase, and the objection involves the absurdity of asserting that the exercise of the right involves a surrender of the very ground upon which the right was claimed, and generally that an effectual way to abandon land is to procure a deed of it. The novelty of this doctrine is equalled only by its profundity.

In the discussion in the Court below, it was insisted by the respondents, that the redemption was made after the expiration of the six months—contending for lunar instead of calendar months. This objection, however, was not presented in the discussion at the bar here, and we suppose that counsel have abandoned it. If they revive it in the brief they have procured permission to file, then we cite in answer: *Parsons v. Chamberlin*, 4 Wend., 512; *Snyder v. Warren*, 2 Cow., 518; *Moulton v. Mayor*, 10 Wend., 395.

The reasoning of these cases when applied to our statute, shows that calendar months were intended. Practice Act, §§ 232, 231.

Again: The revenue acts, so far as they relate to sales of land, are *in pari materia*. See Acts of 1850, p. 40, § 47; Acts of 1851, p. 159, § 41; Acts of 1853, p. 699, § 33; Acts of 1854, p. 110, § 90.

Again: By the reasoning adverted to, the calendar signification must be given to the term as used in the Constitution. Art. IV, § 5; Art. II, § 1.

In Pennsylvania, South Carolina, Virginia, Massachusetts, Maine, Vermont, Connecticut, Alabama, and Kentucky, the term "month" in a statute, is held to mean a calendar month.

In the other States, it does not appear, from the reports, what the rule is, so far as we have had an opportunity of examining them.

4. Admitting that Hyatt had a redeemable interest—that McMillan was a redemptioner—that he redeemed, and in time—the respondents further insist that McMillan cannot maintain this action, for the reason that he has no sufficient deed.

The deed of December 26, 1856, was given to McMillan in his capacity of purchaser at his own sale, March 17, 1857—and its effect was to pass to the plaintiff the title of Randall. This was sufficient for the purposes of this action. Another deed, given after the lapse of sixty days, and as consequent upon the redemption, howsoever desirable as a further assurance, could not operate to transmit any title not already vested in McMillan, by the deed of December 26.

Nor does the sheriff's deed to Hyatt, given on the nineteenth of January, 1857, impair, in the slightest degree, the effect of the deed to plaintiff, of December 26.

Assuming the validity of McMillan's redemption, the sheriff had no power to give a deed to Hyatt. The sheriff is a mere ministerial officer, and after McMillan's redemption, any deed given by him to any other person than the one who had the legal right to it would be null and void, not only on the ground of excess of power, but also on the ground of fraud, and no proceeding instituted for the purpose of setting it aside, would be necessary. 1 Denio, 272, *Ex parte Raymond*.

In this case the sheriff was decreed to give a deed, notwithstanding another was outstanding in the hands of a third person. *Dickenson v. Gilliland*, 1 Cow., 481, 489; Practice Act, § 232.

5. As to the Smith judgment and sale, it is apparent that they present no objection to the plaintiff's right—and on that respondents have made no point. Though the Smith judgment was older than McMillan's, still McMillan's judgment was recorded in Marin county (February 7, 1855) before the levy and sale on the Smith judgment (March 12, 1855.) This last judgment was never recorded in Marin county at all.

6. The facts are all found, including the damages for the detention of the premises, and if the judgment should be reversed, it is submitted that a final judgment may be directed by this Court for the plaintiff.

*John Currey* for Respondents, in the ejectment-suit.

1. The mortgage, executed by Osio, and the foreclosure thereof, vested in Cary the legal title in the land mortgaged.

By the common law of England, upon the execution of a mortgage-deed of the freehold and inheritance, the legal estate in the land mortgaged became vested in the mortgagee, subject to be divested by the payment, at the day appointed, of the money, to secure which the mortgage was made. If the condition by which the mortgagee was to become divested of the title, was not strictly performed, his estate then became absolute and indefeasible. *Jickling's Analogy between Legal and Equitable Estates*, pp. 60, 70; *Coventry's Notes to Powell on Mort.*, p. 269; *Black. Com.*, 157, 158.

In view of the severe consequences of default on the part of

the mortgagor, resulting in the entire loss of his estate, Courts of Equity became induced to interfere to mitigate the rigor of a legal forfeiture. "They did not," says an elementary writer, "make the attempt of altering the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity with the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but, leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law." Coote on Mort., p 10. And these Courts, proceeding upon the principle of relieving against a forfeiture, the effect of which was admitted to be to invest the mortgagee with the absolute estate, and acting *in personam* and not *in rem*, allowed the debtor to redeem the estate lost, by paying, within a reasonable time, the mortgage-money, interest, and costs; upon which he was entitled to call on the creditor for a re-conveyance of the estate. 2 Cruise Dig., tit. 85, ch. 1; 2 Story's Eq. Jur., §§ 1012, 1013, 1014; Willard's Eq. Jur., 426, 427. This right acquired the name of an equity of redemption, and was not, until a comparatively recent period, says Judge Story, settled to be anything more than the mere right to reduce the estate back into the possession of the mortgagor by the payment of the debt, or other discharge of the condition. "But it is now firmly established," says this commentator, "that the mortgagor has an estate in the land, in equity, in the nature of a trust-estate." 2 Story's Eq. Jur., § 1015; Willard's Eq. Jur., 427, 428.

Equity jurists do not pretend that the legal title, after mortgage-in-fee, remains in the mortgagor. *Conrad v. Atlantic Insurance Co.*, 1 Pet. R., 441. Judge Story, after speaking of the growth of the chancery jurisdiction, in respect to this subject, says, triumphantly: "But it is now firmly established that the mortgagor has an estate in the land, in equity, in the nature of a trust-estate."

Chancellor Kent says: "The legal ownership is vested in the creditor: but, in equity, the mortgagor remains the actual owner until he is debarred by his own default or by judicial decree." 4 Kent, 133. Again he says: "Upon the execution of the mortgage, the legal estate vests in the mortgagee, subject to be defeated upon performance of the condition." *Ib.*, 154.

Until the time of Lord Hardwicke, an equity of redemption was regarded as a mere right, and not an inheritance that could

be entailed within the statute of *de donis*. *Roscarrick v. Barton*, 1 Ch. Cas., 217; but in the case of *Casborne v. Scarfe*, 1 Atk., 602, heard before Lord Hardwicke, he declared the equity to be an estate in the land until debarred of it by decree of foreclosure.

The equity of redemption having, under the fostering care of Courts of Equity, grown into an estate in the land mortgaged, depends upon the same jurisdiction for its recognition and beneficial existence.

The superiority and paramount character of the mortgagee's estate at law is demonstrated in the fact, that, unless restrained by agreement or positive law, "he may, when he pleases, and before default, put the mortgagor out of possession by ejectment or other proper suit. This is the English doctrine, and it prevails very extensively in the United States." 4 Kent's Com., 155; *Birch v. Wright*, 1 T. R., 378; *Rockwell v. Bradley*, 2 Ct., 1; *Blaney v. Bearce*, 2 Greenl., 132; 2 Mass., 493; *Newell v. Wright*, 3 *ibid.*, 138; *Colman v. Packard*, 16 *ibid.*, 39; *Simpson v. Ammons*, 1 Binney, 176; *McCall v. Lenox*, 9 Serg. & Rawle, 302; *Jackson v. Langhead*, 2 Johns., 75; *Jackson v. Fuller*, 4 *ib.*, 215; *Jackson v. Hull*, 10 *ib.*, 480; *Jackson v. Hopkins*, 18 *ib.*, 487; *Doe v. Grimes*, 7 Blackf., 1; *Doe v. Mace*, 7 *ib.*, 3.

In *Birch v. Wright*, 1 Tenn., 383, the point was adjudged directly, and the Court said: "The mortgagee has the right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will, and he is entitled to the estate as it is, with all the crops on it."

In *Doe v. Grimos*, 7 Blackf., p. 1, which was an action of ejectment by the mortgagee against the mortgagor, commenced before default on the part of the mortgagor, the only question was whether the action could be maintained before default, where the mortgage was silent as to the possession. The Court held that it could; and, among other things, said: "Courts of Equity also acknowledge the right of the mortgagee to the possession, and will not, it seems, interfere to prevent him from pursuing his legal remedy." *Cholmondelay v. Clinton*, 2 Merivale, 359; *Williams v. Medlicot*, 6 Price, 495.

The case of *Doe ex dem. Brown v. Mace*, 7 Blackford R., 3, was an action of ejectment by the heirs of Thomas B. Brown, deceased, who was the mortgagee of the premises; the defendants were the mortgagors, and others holding under them. The Court said: "The legal title being in the mortgagee at the time of his death, it descended to his heirs, who hold the possession and receive the rents and profits as trustees for the administrators." The Court further said: "The remaining question is, whether a mortgagee can dispossess the mortgagor and those holding under him, without a demand of possession or notice to quit. \* \* \* Formerly a mortgagor in possession was regarded

in the light of a tenant-at-will to the mortgagee, (*Powsley v. Blackman*, Cro. Jac., 659,) upon which was predicated the opinion that a notice to quit was necessary before he could be dispossessed. That view is now exploded, and it is generally acknowledged, at this day, that no such relation exists between them. He is not entitled to the emblements, nor does he hold, paying rent; he is in possession by sufferance, merely, of the mortgagee, and is, therefore, not entitled to notice to quit before ejectment may be brought against him. The English authorities, since the days of Lord Mansfield, are uniform on this point. *Keech v. Hall*, Doug. R., 21; *Birch v. Wright*, 1 Tenn. R., 378; *Doe ex dem. Fisher v. Giles et al.*, 5 Bing., 421; *Doe ex dem. Roby v. Maisey*, 8 B. & C., 767. In the United States there is some contrariety in the decisions, but the weight of them is in accordance with the English authorities."

See also *Phyfe v. Riley*, 15 Wend., 253; *McMahan v. Kimball*, 3 Blackf., 1-13; and *Keech v. Hall*, and *Notes by Hare & Wallace*, 1 Smith's Lead. Cases, 487.

The law concerning estates in dower, as it exists at common law, affords another illustration of the doctrine here maintained. To entitle a widow to dower, three circumstances must needs concur: 1, a legal marriage; 2, seizin of the husband; and 3, the death of the husband. The seizin of the husband, requisite as the foundation for the widow's title to dower, must be more than an equitable seizin—it must be a legal seizin of the estate of inheritance. Upon this principle of requiring a legal seizin in the husband, says Jickling, at page 141 of the book before mentioned, "If at the celebration of the marriage the estate be subject to a mortgage-in-fee, and continue so subject until the death of the husband, the widow will not be entitled to her dower, though it would be otherwise if the mortgage were for a term of years; as in the latter instance, the husband still continues seized of the freehold and inheritance." *D'Arcy v. Blake*, 2 Sch. & Lef., 388; 4 Kent, 43-44.

In the case of *Stelle v. Carroll*, 12 Peters' R., 204, Chief Justice Taney declared that "according to the principles of the common law, a widow is not dowable in her husband's equity of redemption; and if a man mortgages in fee, before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower." Though the mortgagor may remain or be in possession, this rule is not thereby changed. He cannot disseize his mortgagee, because, as was distinctly held in *Cholmondelay v. Clinton*, and *Birch v. Wright*, the possession of the mortgagor is the possession of the mortgagee. See *McMahan v. Kimball*, 3 Blackf. R., 10.

On the execution of the mortgage, the mortgagor becomes the equitable owner, the mortgagee the legal owner of the land, in which respective situations they remain until the land is redeem-

ed or foreclosed; this seems to be the modern doctrine in relation to the qualities of the estates of mortgagor and mortgagee. Coote on Mort., 319.

The respective estates of mortgagor and mortgagee having thus been noticed, it becomes important to consider, in the next place—

What is the effect of a decree of foreclosure or judicial sentence barring the equity of redemption, or equitable estate of the mortgagor?

As preliminary to the subject-matter of this inquiry, it may be observed that the principle of substantial justice, which induced Courts of Equity to interfere on behalf of a mortgagor who had forfeited his estate, and to relieve him from the consequences of his neglect to perform the condition by which he was to be reinvested with his former estate in the land, led to the establishment of rules by which the mortgagee might compel the mortgagor to repay the money borrowed, with interest, or, in default thereof, to be forever foreclosed from redeeming the estate; that is, barred and utterly excluded his equity of redemption therein, without possibility of recall. 2 Black. Com., 159; 3 Powell on Mortgages, 961.

This doctrine, upon the principle *ex equo et bono*, grew into existence, *ex necessitate*, as a consequence of the exercise of a jurisdiction which recognized and gave effective existence to the equity of redemption, as an equitable estate in the mortgagor. 1 Powell on Mortgages, 335.

The operative force and effect of a judicial foreclosure is all that is necessary to be examined in this place; and, if the language of elementary writers and of jurists on the subject is to be understood in its natural import, there can be no difficulty in arriving at a definite conclusion in relation thereto.

Mr. Coote says: "By the civil law, the debtor might redeem the estate on payment of his debt, at any time before sentence passed." Coote on Mort., 10. "Until debarred by judicial sentence." Ibid., 209. "Until decree of foreclosure." Ibid. "The mortgagor is the equitable owner until the land is redeemed or foreclosed." Ibid., 319.

"Both at law and in equity," says Mr. Jickling, "the conveyance is at first conditional, not absolute; and in both, the estate may, on an event, be discharged of the condition, and become the indefeasible property of the mortgagee. At law, that event is the non-payment at the day agreed upon; in equity, it is the decree of a Court of judicature. In the former jurisdiction, it is conventional; in the latter, judicial." Jickling's Analogy, 66.

Chancellor Kent, in his definition of a mortgage, states that "the legal ownership (of the land mortgaged) is vested in the creditor; but in equity, the mortgagor remains the owner until he is debarred by his own default, or by judicial decree." 4

Kent., 133. And again: "The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that until decree of foreclosure, the mortgagor continues the real owner of the fee." Ibid., pp. 159, 160.

"Foreclosure," says Hilliard, "is the process by which a mortgagee acquires an absolute title to the property of which he had previously been only the conditional owner, or upon which he had previously a mere lien or incumbrance." 2 Hilliard on Mort., 1, 1st ed.

Whenever the decree is pronounced, the event which fixes limit to the mortgagor's equitable estate has happened; and to say the mortgagor may redeem after "sentence passed," or after he is "debarred by judicial decree," or "decree of foreclosure," is in contradiction of, and directly repugnant to language so explicit and entirely unambiguous, as to preclude the possibility of successful cavil.

But upon the effect of a decree of foreclosure, *eo instanti*, upon the equity of redemption or equitable estate of the mortgagor, we are not without express authority, as will presently appear.

The estate of the mortgagor, which, after condition broken, is a mere equitable estate, as between mortgagor and mortgagee, can be protected and enforced only in a Court of Equity. This estate depends for its vitality upon the power that nurtured it into existence; and, to attempt to prove, proceeding upon elementary principles, that after forfeiture or default, the mortgagor had an estate at law in the mortgaged land, would of necessity result in *reductio ad absurdum*.

The English practice of a strict foreclosure of the equity of redemption, whereby the creditor takes the estate to himself, instead of having it sold and the proceeds applied, seems to be provided against by our statute, (Practice Act, §§ 246, 247, 248, 260,) and instead thereof, we have the practice that prevails at this day, to some extent, in England, of obtaining a decree for the sale of the mortgaged premises by an officer of the Court, and for the application of the proceeds of the sale to the discharge of the mortgage-debt. But, though the decree may direct a sale of the mortgaged premises for the payment of the debt secured, still the effect of such decree is not to postpone the foreclosure as a bar and extinguishment of the equity of redemption.

Mr. Coventry, in his Notes to Powell on Mortgage, says: "It may be proper to mention here, that foreclosures in Ireland are effected by means of a decree for sale. The equity of redemption stands for ever foreclosed, but the estate is directed to be sold, and the mortgagee paid his principal, interest, and costs, and the surplus returned to the mortgagor, his executors or administrators." 3 Powell on Mort., 963.

The English practice adverted to, of decreeing a sale of the

mortgaged land, etc., received the approbation of Chancellor Kent, who said the same practice prevailed in New York, Maryland, Virginia, South Carolina, Tennessee, Kentucky, and Indiana, (4 Kent, 181,) and to which may be added California; and yet in those States, in the construction of the effect of their decrees for a sale, the Courts have held that the decree barred, *ex proprio vigore*, the mortgagor's equity of redemption. Thus in *Lansing v. Goelet*, 9 Cow. R., 346, it was decided that a decree of foreclosure and sale, and a decree of sale without any express decree of foreclosure, were equally a complete bar of the equity of redemption.

In Kentucky, in the case of *Patterson v. Carneal*, 3 Marsh. R., 621, it was held that a mortgagee, after a decree of sale, holds the legal estate, and may sell the mortgaged premises. In what respect is the estate of the mortgagee, after foreclosure, less perfect and absolute because the officer of the Court, or sheriff, may be directed to sell the premises? See *Whiting v. The Bank of the United States*, 13 Peters' R., 15.

In *Slaughter v. Foust*, 4 Blackf. R., 381, the Supreme Court of Indiana said, "A mortgagee has three modes of enforcing satisfaction of his demand, to which he may resort concurrently or separately, at his election; he may bring ejectment, and thus acquire the rents and profits of the mortgaged premises until his debt be satisfied; or he may sue at law on the evidence of his claim, in which case he looks, in the first instance, to the personal property of the mortgagor; or he may by a proceeding in chancery enforce a lien on the land. The result of this latter process, in England, is generally a strict foreclosure of the equity of redemption of the mortgagor, and the investment of an absolute estate in the mortgaged premises in the mortgagee. Under the law of this State, the equity of redemption is also foreclosed; but the land is sold for the satisfaction of the debt, and the overplus arising from the sale, if any, is returned to the mortgagor. This difference in the result, however, does not change the character of the proceeding, which in both countries is *in rem*."

Our statute, which declares "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale," (Practice Act, § 260) does not change the law as to the respective estates of mortgagor and mortgagee. It goes no further than to disable the mortgagee from entering for condition broken, and drives him to a judicial foreclosure and sale of the premises for the satisfaction of the mortgage debt.

A statute, having a similar effect, exists in New York (2 Rev. Stat., § 12, § 57; 11 Wend., 538; 2 Denio, 176, note,) yet it was never pretended there that the mortgagor's equity of redemption remained after decree of foreclosure. 10 Paige R., 246. Our

statute, (Practice Act, § 260,) in fact recognizes the legal effect of the mortgage as a grant of the legal estate to the mortgagee, which becomes absolute on condition broken, by affirmatively providing that the mortgage shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the property without foreclosure and sale.

The doctrine of the adjudged cases may be stated, without hazarding successful controversy, to be that after decree of foreclosure or judicial sentence, and immediately thereupon, the entire estate, both legal and equitable, becomes vested in the mortgagee, subject only to a judicial sale, from the proceeds of which the mortgagor may, perchance, derive the benefit of a resulting surplus.

2. The appellant was not, and did not become, by reason of his judgments, or either of them, at any time, a creditor having a lien on the property in controversy, or on any share or part thereof; and hence he was not entitled to redeem such property from the sale thereof, under the decree of foreclosure of said mortgage.

Subsequent incumbrancers of the estate mortgaged, whether by judgment or mortgage, by the same system of jurisprudence that raised the equity of redemption to the dignity of an estate in the land, have an equitable right to redeem, and may, in a Court of Equity, enforce such right, unless barred thereof by statute or the decree of a competent Court.

The involuntary alienation of land, or an estate therein, that is an alienation by mere act and operation of law, did not exist by the common law of England. The tendency of the feudal system was to secure to the lord the exclusive services of his tenant; and hence the feudatory could not subject himself or his landed estate to the payment of his debts; his goods and the profits of his lands alone were liable. After the strictness on alienation of estates was partially removed, to remedy the evils consequent upon such alienation by the debtor, and the inconvenience attending the proceedings by writ of *levari facias*, the statute of Westminster 2d, 13 Ed. I, c. 18, was enacted, under which a judgment obtained in any of the Courts of Westminster, became a lien on freehold estates, as it enabled the judgment-creditor to obtain possession of a moiety of the debtor's lands and tenements by the writ of *elegit*; and, in certain cases, by the statutes, merchant or staple, the whole thereof, by extent. The judgment so obtained became, however, only a general lien. *Finch v. Winchelsea*, 1 P. Williams R., 279; 9 Mod. R., 365, and affected only the legal estate of the debtor. 2 P. Wms., 492.

Courts of Equity, holding the equity of redemption to be an estate in the lands mortgaged, and at the same time regarding the claim of the judgment-creditor as a just charge against the

debtor's remaining interest in such lands, upon the maxim, *æquitas sequitur legem*, recognized the judgment of the creditor as affecting the debtor's equity of redemption; and as the creditor, under such circumstances, had no remedy at law to render his equity available, these Courts aided him to make his claim effectual by subjecting the estate, after the discharge of prior incumbrances, to the satisfaction of his judgment.

The rule that a subsequent judgment-creditor may redeem from prior incumbrances, has been long and firmly established, but as the lien is only upon the equitable estate of the mortgagor, it follows as a logical deduction, necessary to the preservation of the law as a science, that it can be enforced, in the absence of positive law on the subject, only in a Court of Equity.

The point under consideration involves two questions—the first is, did the judgments of the appellant, recovered after the decree of foreclosure, or either of them, become a lien on the land in controversy? And the second is, was the appellant, as a judgment-creditor of Randall, entitled to redeem the property from the sale made under the decree? If the first of these inquiries is determined in the negative, the negative of the second follows as a corollary of the first.

1. The negative of the first of these questions is involved as a necessary consequence of the determination or foreclosure of the equity of redemption by judicial decree; which view is materially strengthened by the rule that uniformly prevails in Courts of Equity, that incumbrancers subsequent to the mortgage, but prior to the filing of the bill for the foreclosure thereof, must be made parties thereto. Coote on Mort., 504, 505; 3 Powell on Mort., 990, 991. This is required in order to prevent multiplicity of suits, and that the proceeds of the mortgaged estate may be duly distributed. 4 Kent, 184. "The reason of the rule," says Chancellor Kent, "requiring incumbrancers, subsequent as well as prior to the plaintiff, to be made parties, is to give security and stability to the purchaser's title; for he takes a title only as against the parties to the suit; and it can not and ought not to be set up against the subsisting equity of those who are not made parties." Incumbrancers who are not made parties to the suit will not be bound by the decree. 2 Vern., 601, 963; 2 P. Wms., 643; 3 Ves., 314. This was so held by Chancellor Kent, in an able review of the subject, in *Haines v. Beach*, 3 John. Ch. R., 459. See also Story's Eq. Plead., §§ 194, 201; and *Watson v. Spence*, 20 Wend. R., 282.

But as to persons who become incumbrancers after bill filed, Judge Story states the rule as follows: "But incumbrancers who become such *pendente lite*, are not deemed necessary parties, although they are bound by the decree; for they can claim nothing except what belonged to the person under whom they assert title, since they purchase with constructive notice; and

there would be no end to suits, if a mortgagor might, by new incumbrances, created *pendente lite*, require all such incumbrancers to be made parties. Story's Eq. Plead., § 194. In a case (Bishop of Winchester v. Beavan, 3 Ves., 314) before Lord Anvanley, M. R., he said, a judgment confessed after bill filed would not do, that it would not create an equity. In Cook v. Mancius, (5 John. Ch. R., 94,) Chancellor Kent said: "The plaintiff became an incumbrancer *pendente lite*, and therefore, according to the doctrine in the case of the Bishop of Winchester v. Paine, (11 Ves., 194,) it was not necessary that he should have been made a party, and he has no right to redeem.

The reason of the rule which bars the equity of the creditor, who obtains a judgment *pendente lite*, and denies to him the right to redeem, applies *a fortiori* to the creditor whose judgment is obtained subsequent to the decree of foreclosure.

If the judgments of the appellant, obtained subsequent to the entry of the decree of foreclosure, could become a lien on the land in controversy, then, according to the theory insisted upon on behalf of the appellants, to the effect that the legal estate in the premises remained in Randall, until deed executed under the foreclosure sale, a judgment obtained against Randall on and even after the thirteenth of December, 1856, would have become a lien on the same land.

2. From the foregoing views it follows as an inevitable sequence, that the appellant was not entitled to redeem the premises from the sale thereof under the decree of foreclosure, for he was not a creditor having a lien by judgment or mortgage on the property sold, or any share or part thereof, subsequent to that on which the property was sold, within the provisions of the statute. Prac. Act, § 230, Sub. 2.

3. The right of redemption given by the statute to the judgment-debtor or his successor in interest, and to a creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which it was sold, is a mere right created by the statute.

The statutory right to redeem land sold on execution, and also under a decree of foreclosure, (2 Cal. R., 595,) is purely personal. This right, in its qualities, resembles somewhat the nature of an advowson, of which Sir William Blackstone says: "It is not itself the bodily possession of the Church and its appendages. \* \* \* The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporeal possession be had of it." 2 Black. Com., 21.

This statutory right is not of equal dignity to the equity of redemption, denominated an equitable estate in the land, but it

exists in abstract contemplation, possessing no element of corporeal property. *Kelly and wife v. Beers*, 12 Mass. R., 387.

The right to redeem, thus created by statute, is a legal right, as contradistinguished from the equitable right to redeem, existing in favor of a mortgagor, or one having a lien by subsequent mortgage or judgment on the premises, and is not capable of being enforced otherwise than as a legal right, standing in derogation of the common law rights of the mortgagee or purchaser, under the decree of foreclosure. It is not a thing that can be the subject of a lien, because it is not property in any sense; it is a *mere pre-emption*, and its entire value is dependent upon the performance of conditions precedent to the rendering of it productive of property. The performance of the necessary precedent conditions, is wholly a matter of volition on the part of the person holding such right; and, until such performance, there exists nothing beyond a *privilege* to become the purchaser of the estate, on specified terms.

From the views already stated, in respect to the nature and qualities of this right, it follows that it cannot be seized and sold on execution.

4. If the Court should hold that Randall, under and by virtue of the statute creating the right to redeem, as therein specified, had an interest in the said premises after decree of foreclosure, then, upon such hypothesis, there is no error in the decision of the Court below, and the judgment thereon, because the appellant, on the 13th of December, 1856, had no capacity or right to redeem said lands, from the sale thereof, under the decree of foreclosure.

1. By § 230 of the Practice Act, there are two classes of persons who may redeem :

First, the judgment-debtor or his successor in interest.

Second, a creditor having a lien, by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold.

The second class are termed redemptioners.

The finding of the facts by the District Court, which are conclusive upon the parties in this forum, shows that the appellant appeared before the sheriff, and there assumed the right to redeem, in the character and capacity of a "redemptioner." Having thus presented himself as a redemptioner, he should not be allowed to appear in this Court in any other character. *Klock v. Cronkhite*, 1 Hill R., 110.

In order to have entitled the appellant to redeem on the 13th of December, 1856, it was necessary that he should have been a creditor, having, at that time, a lien, by judgment or mortgage, on the property in controversy. Practice Act, § 230, sub. 2; *Erwin v. Schriver*, 19 John., 379; *Hurd v. Magee*, 3 Cow., 35; *Merry v. Hallett*, 2 Cow., 497.

The authorities are uniform to the effect that, if the appellant had no lien, as a creditor, on the property sold, when he came to redeem, then he had no standing, in the premises, as a redemptioner.

Even if the foreclosure could not have become complete, as a bar, until a sale under the decree, that having taken place in June, 1856, it, from that time, barred the parties to the suit of foreclosure, and all others, making claim of any sort, dependent upon the title of Osio or Randall. By a construction of the effect of the decree of foreclosure, most favorable for the appellant, his case, after sale under the decree, was within the rule laid down in *Klock v. Cronkhite*, 1 Hill R., 110, in which it appeared that one Elwood, who had recovered a judgment against the mortgagors of certain premises, sold the same premises, before foreclosure, on execution upon his judgment, and became the purchaser. The sale, under the mortgage-foreclosure, was made before Elwood received his deed from the sheriff. The question arose, in this case, whether Elwood had a lien on the premises at the time of the mortgage-sale. The Court held that he had not; and Justice Bronson, who delivered the opinion of the Court, said: "He (Elwood) had previously sold, under his judgment, and his right to a deed had become perfect on the 8th of February, 1836, when the time for redeeming expired. \* \* \* \* \* At the time of the sale, Elwood stood in the character of grantee, or assignee, of the mortgagors, and, as such, he was foreclosed of all equity of redemption."

\* \* \* \* \*

"Elwood must claim in one of two ways, and not in both. He must say, either that he is the owner of the equity of redemption, at the time of the mortgage-sale, or that he was a judgment-creditor, having a lien. If he claims the equity of redemption, the answer is, that that interest has been foreclosed; if he claims merely as a judgment-creditor, having a lien, he must then go into equity and redeem."

The appellant stood in no better predicament, at the time of the foreclosure sale, than did Randall. In a case before Chancellor Walworth, where it was sought to be maintained that the right of redemption remained open until the purchase by the mortgagee, was consummated, the deed delivered, and the report of the sale confirmed, he said: "If such a rule exists, it is one which I never heard of before; and no such right has been claimed, by the owner of the mortgaged premises, in any suit or proceeding, before me, during the fifteen years that I have presided in this Court." *Brown v. Frost*, 10 Paige Ch. R., 246.

2. According to the finding of the facts by the Court below, all the interest of Randall in the premises, if any he had after decree of foreclosure, was sold on the 12th of March, 1855, under an execution issued upon the judgment of Smith, recovered in

the month of November, 1854, and purchased by defendant Richards, who, long before the time of the attempted redemption, had received his deed of conveyance. The sale under this judgment was made several months before the recovery of the appellant's second judgment, and hence such second judgment could not be made available as the basis of a redemption on the 13th of December, 1856, as it was barred by the sale and conveyance under the Smith judgment. Then if appellant had any right to redeem as a judgment-creditor having a lien, it could only be by virtue of his judgment, obtained against Randall in January, 1855. But in respect to this judgment it appears that an execution was issued upon it on the 12th of January, 1856, and all the interest of Randall in the premises, if any he had, was again sold by virtue thereof, on the 17th of March, 1856, so that the lien of that judgment, if it ever was a lien on said premises, became destroyed by the sale of Randall's interest under it.

In *Hewson v. Deygert*, 8 Johns. R., 333, the Court held that the sale of land on the first instalment of a judgment, extinguished the lien of the judgment as to that land.

In *Ex parte Stevens*, 4 Cow. R., 133, it was held that a sale of land by virtue of a judgment and execution thereon issued, though for only a part of what was due on the judgment, with the lapse of fifteen months (the time allowed by statute for redemption) from the time of sale by the sheriff, destroyed the lien of the judgment for the balance remaining due; and the judgment-creditor for the balance could not redeem the land from a purchaser under a senior judgment; such a sale destroyed also the lien of all junior judgment-creditors. See, also, *Klock v. Cronkhite*, 1 Hill R., 110.

Then, proceeding upon the hypothesis that Randall had an interest in the premises, which became charged with a lien by the first of appellant's judgments, and which interest was sold to appellant on the 17th of March, 1856, under an execution issued on such judgment, then immediately after the 17th of September, in the same year, the appellant was entitled (as there was no redemption from such sale) to a deed of conveyance of the premises, from the sheriff. By such sale and conveyance Randall was divested of all his interest in the premises, and from that time there was no interest in him whereon the judgment could subsist as a lien.

*Wright v. Douglass*, 2 Comstock's R., 373; *Jackson v. Ramsay*, 3 Cow. R., 75; *Jackson v. Dickenson*, 15 John. R., 309; *Waller v. Harris*, 20 Wend., 558; 7 Paige R., 177.

If the doctrine of these authorities be true, then it results that the appellant was not, at the time of his alleged redemption, a creditor having a lien by judgment, or otherwise, within the statute:—and having on that occasion represented himself as a “*redemptor*,” he ought not to be allowed now to

shift his position to that of a successor in interest. But if he were permitted so to do, it is difficult to understand in what respect he would be in any better predicament, if the authority of *Klock v. Cronkhite*, and the cases cited, as to the necessary and proper parties to a bill of foreclosure, are to be regarded as containing sound rules of law.

5. Even if the appellant, by his judgment, acquired a lien on the lands mentioned, and such lien continued until the time of the alleged offer to redeem, still he failed to effect a redemption of said lands from the sale thereof, under the decree of foreclosure.

Section 234 of the Practice Act designates the vouchers and proofs which a redemptioner shall produce to the officer or person from whom he seeks to redeem; and section 231 specifies what amount of money shall be paid for the purpose of redemption, and the time within which it must be paid; and section 233 provides that the necessary payment may be made to the purchaser, or, for him, to the officer who made the sale; and also that a tender of the money shall be equivalent to payment.

Then, in the first place, was the officer who made the sale under the foreclosure, to be deemed the agent of the purchaser at such sale? This depends upon the fact whether or not he was constituted such agent. By the statute he had capacity; but, before he could become agent, or trustee, it was necessary he should be constituted such by one having the power, that is, by a creditor having a lien and entitled to redeem, by the giving of the notice required, (§ 232,) and by the production of the evidence specified (§ 234.) Without the action of a creditor having a lien, the sheriff cannot become the agent, or trustee, for the purchaser; and, by such action, he can become no more than a special agent, or trustee, for the purpose specified in the statute; and then, as was said in a like case, "he must conform to the authority with which he is clothed. If he does not, his acts are void." *Dickinson v. Gilliland*, 1 Cow. R., 498. It should be remembered that, if the sheriff was constituted agent, or trustee, for the purchaser, in this case, it was without, and independent of, the action or consent of the purchaser. In such case, he was made such agent, or trustee, by the constituting power of the appellant; and, in whatever respect he may have deviated from, or gone beyond, the duty required of him by the statute, as such agent or trustee, in that respect, as to the purchaser or his assignee, his acts were *coram non judice*, and void. *Griffin v. Thurston*, 2 How. U. S. Rep., 245, 256, 257; *McFarlan v. Gwin*, 3 How. U. S. R., 717, 720.

It cannot be denied that a person who would redeem must pay, absolutely, the amount necessary to effect the redemption. Did the appellants so pay such amount?

A payment, in its true sense, presupposes the sum paid to have

been due; and to say that one paid, when nothing was due, is a solecism.

In the case of a redemption, under the statute cited, the creditor, seeking to redeem, must ascertain and determine for himself, and at his peril, the sum necessary for the purpose; and must pay it unconditionally, and untrammelled by terms or reservations.

In *Ex parte Raymond*, 1 Denio, 275, the Court said: "A party, seeking to acquire the rights of a purchaser, under this statute, (the Statute of Redemption,) must take care to comply fully with its requirements. \* \* \* \* The papers, in the hands of the sheriff, showed what sum was required to be paid to make a legal purchase of the land; and, although the relator and his counsel were present, they were not bound to volunteer anything on the subject. \* \* \* \* The matters of fact were equally well known to all the parties; and as to the law, each would determine for himself, and act at his peril."

In the case here cited, one subsequent creditor sought to redeem from another, who had acquired the right of the original purchaser of land, sold on execution, by paying the necessary sum; and though, from the case, it appeared that he believed he had complied with the law, and in good faith intended to pay all that was necessary to effect the object, still as his payment was insufficient in amount, the Court held him bound and barred by the omission.

In support of the same principle, see the cases of *Dickinson v. Gilliland*, 1 Cow., 498; *People v. Covill*, 18 Wend., 598; *Waller v. Harris*, 20 Wend., 555; *Silliman v. Wing*, 7 Hill, 161.

The rule, requiring a strict compliance with the demands of the statute, in order that a redeeming creditor may acquire the benefits contemplated by its provisions, rests upon principle as well as authority. It is the mode and means by which the creditor becomes, in effect, the purchaser of the estate so redeemed, and that, too, without the consent of the prior purchaser; and for both these reasons, there must be a strict compliance with the requirements of the statute; and there can be no condition so entirely indispensable as the unqualified and unclogged payment of the amount due.

The payment required can not be evaded by instituting a controversy with the officer, or by imposing on him duties which do not pertain to his agency in the premises. The appellant can not be excused his delinquency because of a mistake or over-demand of the officer, if made, for he was bound to determine the amount for himself, and pay or tender payment of it, in the one case; and in the other, the officer could not, *as agent*, demand anything whatever.

What does the appellant seek to do in this case, other than to secure to himself, by a device, the advantages of a redemption,

without allowing the party entitled to the money, if a redemption was made, a dollar of it?

The delivery of the money to the sheriff, could not operate as a payment; for the declaration made at the time, that that was not the end of the matter, and that it would probably be tied up for several months in litigation, followed immediately by an action against the sheriff for a recovery of a large portion of it, and an attachment of the whole of it; and afterwards again by a suit in chancery, on behalf of appellant, locking it up by injunction, to await an accounting for the purposes of a redemption, after the time limited by statute had expired, was certainly loading it, as a payment, with clogs, qualifications, and conditions, which followed and incumbered the money wherever it might be, until the objects of the protests or conditions made, might be determined by the threatened litigation. *Strong v. McConnell*, 10 Vermont R., 231.

A payment to effect the object of a redemption of lands, under the statute cited, must be as absolute and unqualified as must be a tender, which it seems the statute provides, may be made. A tender, standing alone, involves the idea of a refusal on the part of the teree to accept the thing tendered. The same thing must be done in a case of tender, as far as it goes, as in case of payment. A tender accepted is a payment or performance; a payment made, involves the acts which would constitute a tender, if the matter or money offered in payment had been refused. The law of tender, therefore, is in strict analogy to the question of payment in the case at bar.

Mr. Greenleaf (2 Green. Ev., § 605,) states the rule in respect to tender to be, that the tender must be absolute, and without terms or conditions. In *Peacock v. Dickerson*, 2 Car. & Payne, 52, (12 Eng. Com. Law R., 24,) Abbott, C. J., said: "A party tendering money, should pay it without making any terms, and should leave it still open to the one party to say that more was due, and to the other to say that the sum tendered was sufficient"

The case of *Wood v. Hitchcock*, 20 Wend., 47, is deemed as clearly in point. In that case, it appeared that the parties had attempted a settlement, at which the plaintiff claimed a balance due him of \$100, the defendant insisting that \$77 was all that was due, but offered to pay plaintiff \$85, and made a formal tender of such sum in full settlement, which plaintiff refused to accept. When sued, the defendant pleaded a tender of the \$85. The Court said: "The tender was defective. It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books; the tender was also bad, because the defendant would not allow that he was even liable to the full amount of what he tendered. His act was within the rule which says he shall not make protest against his liability. \* \* \* It is not of the nature of a tender to make conditions, terms, or

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qualifications, but simply to pay the sum as for an admitted debt; interlarding any other object will always defeat the effect of the act as a tender." See, also, *Robinson v. Batchelder*, 4 N. Hamp. R., 407.

Then, as a question of tender, if it is to be adjudged bad, because the party denies his liability to the full amount of what he tendered, and makes protest against such liability, should not a person who is seeking to avail himself of a statutory right and privilege, which is in derogation of the common law right of another, make absolute and untrammelled payment of the amount necessary to secure the benefits of such right and privilege? If one can not effectually tender, protesting against his liability, how can a person pay, protesting against that which is required of him, if he would avail himself of the advantages of such privilege?

If the delivery of the money to the officer could be treated an absolute payment of the whole sum, then the subsequent acts and proceedings of the appellant, in stopping the money *in transitu*, was a withdrawal of it from the object professedly designed, and an abandonment of the redemption. That the appellant had control over the money, and concerning it, and possessed the right of stoppage *in transitu*, need not be controverted now. That he exercised such power by the aid of judicial process, stands confessed; and it matters not whether he employed the effective means and exerted the power to seize upon this money by right or without right. If by right, then as the exercise thereof intervened to defeat the delivery of the money to Hyatt, the original deposit with the sheriff became abortive as a payment; if by wrong, or without right, then, as the same effect was produced, he is not in a position to escape its consequences. *Nullus commodum capere potest de injuria sua propria*.

The appellant cites the case of *Ex parte Newall*, Receiver, 4 Hill, 589. What was that case, and how does it aid the appellant?

In that case, it appears that Brisbane purchased the land of Hichcox, which was sold on execution. Addington, a judgment-creditor, in due time redeemed, by paying Brisbane his bid, with interest. A certain bank, of which Newall was receiver, had a judgment against Hichcox, older than those on which Addington had redeemed. Under this judgment, Newall, subsequent to the redemption by Addington, redeemed by paying Brisbane's bid, with interest. Addington then went to the sheriff and paid the amount claimed, as due on the bank-judgment; but before he paid, he filed a bill in chancery against the receiver, alleging that the bank-judgment had been satisfied, and obtained an injunction forbidding the sheriff to pay over to Newall the money which he, Addington, might pay to redeem, until the further order of the Court of Chancery. Addington first paid the money to the

sheriff, and immediately after served the injunction on the sheriff, forbidding his paying over the money to Newall. The question was, did Addington redeem? The Court were of opinion that he did. Justice Bronson said: "He (Addington) made an unconditional payment of the amount of the bank-judgment, and the sheriff received and receipted the money, before the injunction was served. The redemption was complete, and the subsequent service of process, to stay the money in the hands of the sheriff, could not undo what had already been well done. It is not like a case of tender, trammelled with conditions, or an offer of payment without parting with the money. Addington put the money entirely beyond his control."

The contest in that case was between two claiming as creditors. Addington alleged that the bank-judgment had been satisfied, and that it was being used in fraud of his rights in the premises. He was seeking a discovery of the fraud, and for a decree declaring the bank-judgment satisfied. This was the only subject of controversy, and was of equitable cognizance. The fraudulent claim of the bank, unless impeached, would cost Addington the amount of the bank-judgment, and he had the right, in a Court of Equity, to thus have it discharged, as an incumbrance on his property, asserted and existing in fraud.

Let Addington's cause of complaint be kept in view. In this case there exists no such grievance. The amount necessary to be paid to redeem, was a fact as well known to the appellant as to the sheriff, and there was no question as to the right, in law or equity, of the assignee of Cary to the money, if a redemption was made. The redemption had to be made within a specified period. The appellant's suit in equity was for an accounting or ascertainment of the amount of money to be paid to redeem. It was in effect a bill to redeem, after the time limited for the purpose by statute, had expired. The appellant's suit at law, for the recovery of \$10,000 of the money, effectually denied that the money had been paid. Between the cause of complaint in the chancery suit mentioned in *Ex parte Newall*, and the causes of complaint in the action of appellant, there seems to be no analogy.

On the appellant's behalf, it is argued :

1. That the money left with the sheriff, constituted a fund in trust, in which the appellant had an interest. The proximate and inevitable effect of this position is, that the deposit did not constitute a payment; and, if the sheriff held the funds in trust, for the appellant and Hyatt, an accounting was necessary before it could be ascertained to what portion of it each of the parties was entitled; and hence it follows, that no part of the money vested in Hyatt.

2. That the payment, under the circumstances, was involun-

tary, and the protest saved to the appellant the right to sue the sheriff, and recover it back, as money had and received to and for appellant's use.

If the payment was not voluntary, the result is that the appellant's property in the money did not pass from him.

3. That the appellant was a creditor, having a lien, by judgment, on the thirteenth of December, 1856, and, in the capacity of redemptioner, could redeem.

This proposition, it is submitted, has already been fully met, in the various phases in which appellant has presented it.

4. That appellant had the right to redeem the premises, in discharge of a lien upon his own land.

This proposition assumes that appellant undertook to redeem in the character of successor in interest.

If the position were maintainable, in any view, then, as there was no evidence produced to the officer that appellant was a successor in interest, the officer had no authority even to receive the money, as for a redemption, by him, as a successor in interest. And to discharge the incumbrance, as the appellant assumes it was, he, as the claimant of the land, which stood charged, *in rem*, should have sought out the creditor who held the incumbrance, and paid him the sum necessary for its discharge. The officer could not act without the authority of the incumbrancer, which it is not pretended he had.

*J. A. McDougall and J. B. Weller* also for Respondents, in the ejectment-suit.

We insist upon three positions, either of which governs the conclusion in this cause, if it can successfully be maintained.

1. That a lien will not attach to real property by judgment against a mortgagor, after condition broken and decree of foreclosure.

2. That after a sale upon a judgment and execution, part only of the judgment being satisfied, the residue of the judgment ceases to be a lien upon the premises sold.

3. That in this case there was no redemption in fact.

The last in order of these positions, we insist upon as just, beyond the chance of controversy.

1. As to the first position, it is not denied but that it is correct, according to the rule of the common law. It is, however, insisted that our statute has changed the rule. We say the only change made by our statute, is as to the possessory remedy, and not as to the position of either the legal or equitable title. *Pr. Act*, 260.

Originally, at common law, the owner of the fee held the entire estate; of which he divested himself only by livery of seizin. A mortgagee received livery of seizin, and the entire estate. Subsequently, upon a modification of the manner of conveyances,

the mortgagee took at law by the terms of his grant, and acquired the entire estate, or the legal right thereto, absolutely upon condition broken. Such is the common law rule now, and it operates a mere enforcement of the contract of mortgage by its terms.

Chancery exercising the equitable and supervisory jurisdiction of the crown, undertook to say, that the contract relations of the parties should be subject to their equitable relations. That a mortgagor should have equity as long as he offered to do equity, and until chancery herself interposed a bar.

This right of appeal to chancery was not upon the idea of an estate in the mortgagor, although within the limits of chancery jurisdiction it was so treated. It was a mere protection against an inequitable advantage the mortgagee might take by the strict rule of the law.

In England and this country, the practice on the part of the mortgagor is to file a bill to redeem upon payment of the debt, and this right to redeem through the Courts of Equity continues until equity itself bars this right by decree.

Until recently, the uniform practice in England was to decree a strict foreclosure at the suit of the mortgagee.

The Irish practice was to decree a foreclosure, and bar the equity of redemption, but at the same time decree a sale of the mortgaged premises, and charge the mortgage-debtor with the residue of the debt, over and above the amount realized from the sale.

This practice has been adopted in many of our States, and is the basis of both the practice and legislation in this State.

The decree foreclosing the equity of redemption, and directing a sale, was as complete an extinguishment of the estate as a decree of strict foreclosure.

All that remained to the mortgagor was his right to the surplus, if any, and the common right, with every other person, to purchase at the sale.

With us, the legal estate proper is still governed by the contract of the parties, or in other words, by the terms of the deed; and this legal estate passes to the mortgagee upon condition broken. With us, it is also true, that the interest, right or estate which was the creature of Courts of Equity, is still within the jurisdiction of equity.

The power to bar the equity by decree of foreclosure, has always been and still continues to be exercised by our Courts without question, and it is well understood that without decree of foreclosure the equity would continue in the mortgagor as formerly.

If, then, the strict legal estate was not in Randall, and if it was competent for the Courts of Equity to bar his equitable right; and if this was done by decree of foreclosure before

McMillan's judgment was filed, what was there upon which McMillan could acquire a lien?

Prac. Act, p. 207, provides that the transcript of judgment filed "shall become a lien upon all the real property of the judgment-debtor." If a legal estate had been extinguished by contract, and the equitable estate by decree, how could the premises in question be called or described as the "real property" of Randall?

The position of appellants must be this, that our law creates a new statutory estate or property. So that we would have the legal estate before condition broken, the equitable estate until barred by foreclosure, and a statutory estate until sale and conveyance.

Before such an anomaly is engrafted upon our system, it should be well considered by our legislators, and the Courts will certainly never establish it by construction, or without express direction and authority of law.

In *Jackson v. Town*, 4 Cowen, 599, it is said: "An equitable or legal seizin must be shown on which a judgment can attach and be a lien in order to warrant a sale."

Are we to change the rule and say an equitable, a legal, or statutory seizin must be shown upon which a judgment can attach.

In conclusion, upon this point, we hold that all which the mortgage-debtor has in the land after his equity is barred by decree, is a statutory right of redemption remaining to him, without any present estate, either legal or equitable, which right is nothing more than the personal privilege of re-purchase within certain limitations. The rights which would accrue upon his exercising this privilege is foreign to this question, and need not be discussed. It is clear, so we contend, that if Randall had neither the legal nor equitable property in this land on the seventh of February, 1855, the judgment of McMillan did not become a lien, and McMillan did not acquire the rights of a redemptioner.

In considering the foregoing question and the authorities bearing upon it, some confusion may arise from not distinguishing between cases where the questions arose between judgment-creditors and their respective rights of lien, sale, and redemption, and the case of the claim of a lien after a bar of the equity at the suit of a mortgagee.

The precedent for such a claim we have been unable to find; and as respondents have failed to present one, we may presume they have been equally unsuccessful.

2. The second position is that the sale by McMillan upon his judgment, extinguished any lien he might have had for the residue.

Without disputing the correctness of this position as a general

rule, the appellant seems to rely upon the decision of this Court, in *Vandyke v. Herman*, 3 Cal., 295.

In that case it was held that a subsequent redemptioner must pay the entire amount of the judgment upon which a previous sale has been made.

We do not conceive our position necessarily affected by that decision; but as that opinion has been presented as authority in this case, with all due respect for the learned Judge who pronounced that opinion, we take the liberty to submit that it is not justified by the statute upon which it purports to be founded, and is directly in the face of all the authorities cited in the case by the counsel upon either side.

The statute, Practice Act, section two hundred and thirty-one, provides that in redeeming from a purchaser, "if the purchaser be also a creditor having a lien prior to that of the redemptioner," the redemptioner shall pay the amount of such lien, with interest.

This rule we acquiesce in; it is and always was the law with regard to redemptions. It is the rule in every State, and never was disputed.

The question was, had the judgment-creditor who bid in for a sum less than his judgment, a lien for the residue; and the opinion of the Court was a mere begging of the question presented by the case.

That decision became necessarily the law of that case; but one decision against authority and reason cannot make the law of the land. Uniformity of decision is desirable, and becomes most important when interests have become established upon the faith of a rule promulgated. But in a matter of this kind, there is no good reason why a palpable error (if there be one) should not be corrected, and a return made to well established rules.

The following are the cases cited in *Vandyke v. Herman*, by the two parties: 5 Hill, 228; 4 Cowen, 132; 2 Hill, 51; 8 John., 333; 2 Wend., 297; 7 Cowen, 367, 658; 1 Cowen, 501; 1 Barbour S. C., 388.

By glancing at these authorities, it will be perceived that we are justified in the position we have assumed. In *Hewson v. Deygert*, 8 John., 233, the Court says: "It is to be presumed that the lands sold, under the former execution, for their value; and the purchase is to be considered as absolute, in respect to the lien or judgment under which they were sold. The sale extinguished the lien as to the lands sold."

*Vandenberg v. Briggs*, 7 Cowen, 366, decides the exact point in question. So, also, *The People v. Easton*, 2 Wend., 298. The rule laid down in the other cases does not conflict with these decisions, and so far as they bear upon the question, lead to the same conclusion.

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If, however, *Vandyke v. Herman* be authority and the law, and if a redemptioner must pay the entire amount of the anterior judgment, and if the residue of the judgment remains a lien so far as to charge a subsequent redemptioner, it does not follow that the judgment-creditor who has once seized the property and sold it, can himself redeem. That the creditor may take the property for his debt, and by his own act make a sale thereof, and by virtue of the same right or power he had to make the seizure and sale take it from the purchaser, involves a palpable absurdity.

The respondents in this case, however, rely less upon any question of law which may be mooted by counsel, than they do upon the fact and finding that McMillan never did redeem.

3. To make this piece of legal legerdemain a redemption, is to make a pretence equal to the thing pretended. It is to give effect to a stratagem, whereby it was designed to avoid the substance of an act, by the substitution of its form. It is to make a pretended offer to do a thing equal to the act performed.

The entire facts are embodied in the findings of the Court, and we will present them in brief.

It was found by the Court, and the correctness of the finding is not questioned, that \$24,146 was sufficient, and \$17,600 insufficient to effect a redemption.

It appears that in depositing the excess over \$17,600 with the sheriff, the same was not deposited with him to be paid to Hyatt, the purchaser from whom McMillan pretended to redeem, but with an express protest against such payment.

That no part of the entire \$24,000 was deposited with the sheriff to be paid to Hyatt, but, on the contrary, with the express request to the sheriff that he should make a deposit of the entire sum with Garrison, Fretz & Ralston, to save interest, and to await a proposed litigation, with notice from McMillan that such litigation was intended, and that the whole amount would probably be tied up for several months.

That before the sheriff could dispose of or pay over the money, or any part thereof, to Hyatt, McMillan seized \$10,000 thereof in the hands of the sheriff, by process of attachment, and the sheriff, on the same day, having deposited the entire amount in two banking-houses in San Francisco, that McMillan seized the entire amount in the hands of the bankers, by the same process.

That a short time thereafter McMillan filed a bill in equity against the sheriff and the bankers with whom he had deposited, praying for a receiver to take and hold the entire sum pending suit, also for an injunction against the payment over of any part thereof; and that such injunction was sued out and served.

That this same condition of things continued down to the commencement of this suit—and it still continues.

It clearly appears that McMillan (we use the name of McMil-

lan to represent the true parties acting and in interest,) by the act of deposit with the sheriff, did not intend to pay Hyatt anything; that he did not even suggest or propose that Hyatt should receive anything; that he directly interposed, by protest as to part, and by action at law and in equity, as to the residue, so as effectually to prevent Hyatt receiving anything; that while admitting, in words, his obligation to pay a part, he himself seizes upon the whole.

To all this Hyatt, the purchaser, is an entire stranger. The redemption is to be effected by paying him the redemption-money. Yet the appellant has the courage, in a Court of Law, to call this a redemption of the estate from the purchaser, who has already paid the price, and has an unquestionable right to hold its equivalent until that price is returned; and has the courage, further, to demand the estate by action at law, and asks judgment of recovery, before the purchaser has received a dollar, and when he has been estopped from receiving a dollar by the direct interference of the appellant.

They do not pretend that Hyatt has received a dollar. It does not appear that Hyatt ever will receive a dollar; Hyatt, as before remarked, is a stranger to this business. He has not seen the money, and he don't know where to find it. Whether or not, under any circumstances, he can ever secure its possession, he is ignorant. All he knows is that certain lands of which he is possessed, and for which he has paid, are demanded of him by action at law, without his having received or been offered anything in return.

It is the high prerogative of sovereignty to seize on private property, but the fundamental law exacts compensation therefor.

The appellant proposes to do by his strategy what the State is not permitted to do by its power.

All these things clearly appear on the face of the record, and it would seem that a bare statement of the undisputed facts should command as certain a conclusion as the most labored argument.

The redemptioner is required by law to make a correct payment, and it is his business to determine the amount. That amount it is his business to pay, not deposit or deliver. It must be paid in good faith, to the use of the purchaser, and with the intent it should be paid to him.

It is true the sheriff is constituted by the law the agent of both parties; but this means nothing more than that the payment by the redemptioner to the sheriff, with the intent of payment through him to the purchaser, is a sufficient redemption, and that under these circumstances the sheriff is authorized to receive the redemption-money for and on account of the purchaser.

It follows that certain acts of the redemptioner are requisite to make the sheriff the agent of the purchaser. Something more

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than the delivery of the money to the sheriff, to be held by him, or to be deposited to save interest, or to be seized by stratagem.

Until the money is paid to the sheriff, to be paid to the purchaser, no relation of privity or agency is established between them.

A delivery with protest to a sheriff is not a payment. It might be otherwise if accompanying the protest were instructions to pay over to the purchaser, but otherwise if the protest and claim were made for the purpose of preventing payment. In the latter case the sheriff would pay over at his peril. The reason is that the redemptioner never having consented to the payment to the purchaser, the sheriff could not be his agent for that purpose, agency implying consent and agreement. A further reason is that it must be the act and consent of the redemptioner which constitutes the sheriff the agent of the purchaser, and here the redemptioner not having given the sheriff the money with instructions to pay the same to the purchaser, or with such an intent, the law would not do the purchaser the injustice to establish by implication, relations between him and the sheriff, which the acting parties were seeking to avoid.

Apart from all these matters of strategy, however, suppose that the redemptioners intended in good faith, to redeem, and delivered the sheriff the \$24,000, \$7,000 thereof under protest, with a claim of right, and with notice to the sheriff to hold the same on his account, and suppose further that the sheriff had paid or tendered to Hyatt the \$17,000, retaining, as directed, the residue, could this operate as a redemption from Hyatt? This simple question is a clear test of the strength of McMillan's position. It is clear such an act would not redeem the premises from Hyatt. *A fortiori*, they have not been redeemed.

*Heydenfeldt & Shafter* for Appellant, in the equity-suit.

1. The bill presents a case of equitable cognizance.

First, it presents a case of trust. *Weymouth v. Boyer*, 4 Ves. Jr., 423; *N. Y. Ins. Co. v. Roulet*, 24 Wend., 505. Assuming the allegations, the subject-matter of trust is the \$24,146 08. McMillan, Hyatt, and others, are the beneficiaries. There is doubt and controversy among these beneficiaries as to the extent of their several interests, and the purpose of the bill is to settle these conflicting money-rights, and close out the trust by a single adjudication.

Second, the jurisdiction may be put upon the ground of the inadequacy of the remedy at law. Money had and received would not meet the case in all of its exigencies.

Third, or the jurisdiction may be upheld on the principle of *quia timet*. 2 Sto. Eq., §§ 825, 826, 839. Vischer is irresponsible.

2. If the redemption was invalid, then the plaintiff is entitled to the whole of the money,—if the redemption was valid, then

he is entitled to judgment for the excess in the payment (\$6,700) charged in the bill and admitted by the demurrer. In either event, the judgment below was erroneous.

The payment of the excess was compulsory. It is well settled, that where money is paid to relieve the person from imprisonment, or personal property from an unjust charge, that the money may be recovered back, on the ground that the payment was by compulsion.

The same principle applies when the payment is made to relieve land from a like charge, or to save it from an impending forfeiture. *Close v. Phipps*, 49 Com. Law, 585; *Commonwealth v. Hall*, 8 Pick., 440; *Cazenove v. Cutler*, 4 Met., 246; *Hays v. Hogan*, 5 Cal., 241.

In all these cases, the party making the payment might have protected himself by a tender, but in making a tender, he must have assumed the hazard. But the law, in its benignity, relieved him from the necessity of subjecting his property to the hazard.

3. It is insisted by appellants, that the bill is demurrable, for the reason that there is no allegation that a demand was made on Vischer for a return of the money before the suit was commenced.

The answer is, that the protest was a sufficient notice to the sheriff. *Hays v. Hogan*, 5 Cal., 241.

*John Currey* for Respondent, in the equity-suit.

The facts stated in the complaint do not constitute a cause of action of equitable cognizance.

1. A Court of Equity will not relieve a party because he did not understand the law. An eminent Judge says: "It is impossible to foresee all the consequences which would result from allowing men to avoid their acts and annul their contracts, on the plea that they did not understand the law. \* \* \* Should we sanction this doctrine, under the notion of administering equity, in a hard case, it could not, I think, fail to open the flood-gates of litigation, and work the most mischievous consequences in the administration of justice." *Champlin v. Layton*, 18 Wendell, 417.

2. If the appellant invokes the aid of equity, because he may have been ignorant of or mistaken as to the amount necessary to effect a redemption, as a fact, on such ground a Court of Equity will not grant relief, because his ignorance was the result of his negligence. *Vigilantibus non dormientibus jura subrenient*. 1 Story's Eq. Jur., § 105; *Penny v. Martin*, 4 Johns. Ch. R., 569.

"Nor will a Court of Equity interfere upon the ground of accident, when the party has not a clear vested right; but his claim rests in mere expectancy, and is a matter, not of trust, but of volition." 1 Story's Eq. Jur., § 105.

That it was the appellant's business and duty to ascertain for

himself the sum to be paid, in order to redeem and to pay such sum, or tender the same, absolutely, and without terms, we think already appears. But it may be, and the point we are not disposed to controvert here, that the sheriff, who, by the delivery of the money to him, became the plaintiff's bailee, might be rendered responsible to this plaintiff for the money by him received, as had and received, to the plaintiff's use.

But, in such case, the sheriff could not become liable in an action to the plaintiff until after demand for the money, duly made by him, and refusal on the part of the sheriff to comply with the demand, and then only in an action in a Court of Law; for equity will not interfere where the remedy at law is complete.

In this case, the complaint fails to show any such demand or refusal, and hence, as against the sheriff, no action, either legal or equitable, for the recovery of the money, or any portion of it, can be maintained.

The doctrine of the adjudged cases, cited on behalf of the appellant, to establish that an action for money had and received may be maintained by a party who had parted with his money, under duress of property, will not be controverted by the respondents; but the application of such doctrine to the case at bar, we venture to deny altogether.

In all the cases cited, of money obtained by extortion, oppression, or unlawful exaction, the complaining party had a present vested interest in the property, for the saving of which the money was illegally paid.

The deposit of the money with the sheriff was not made under duress of property, either real or personal; and, though the plaintiff is entitled to and can receive the whole sum, whenever he will, still the respondents are not disposed to yield to his demand in this form of action.

*John Currey* for Appellants, in the proceeding by *mandamus*.

A motion was made in the Court below, by appellant, to transfer this case to Marin county for trial, which motion was denied. The appellant then demurred to the jurisdiction of the Court, which demurrer was overruled. These decisions, the appellant alleges, were erroneous.

1. The subject of the action or proceeding is situated in Marin county. The proceeding involves the determination of a right and interest in real estate in Marin county, as appears by the alternate writ of mandate, and because thereof, the proceeding is of the nature of a local action according to section eighteen of the Practice Act, which is as follows:

"§ 18. Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial as provided in this act:

"First, for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

"Second, for the partition of real property.

"Third, for the foreclosure of a mortgage of real property."

Before the relator could be adjudged entitled to a deed of the land mentioned in his writ, he was bound to establish a right or interest, either legal or equitable therein. This right or interest he attempted to set forth in his petition, the material portions of which appear recited in said writ. Before the relator could obtain the relief which he sought, his right or interest in the real estate mentioned, must needs be adjudged and determined by the Court.

The relator instituted this proceeding to compel the execution by the sheriff to him of a title-deed for said real estate. Title-deeds are considered a part of the inheritance, and pass to the heir as real estate. 1 Bouvier's Law Dictionary, 887; and the cases therein cited.

In *Atkinson, Adm., v. Baker*, 4 T. Rep., 229, 280, which was an action of detinue to recover certain indentures of bargain and sale and release, and a certain memorandum in writing, Lord Kenyon said, "Before the plaintiff can recover the deeds in question, she must show a title to the estate in respect to which she claims the deeds," etc.

If the relator prevailed, what would be the command of the peremptory writ of mandate? The answer is, to make a conveyance of the premises to the relator. And how is the relator to establish his right to such a conveyance, except by proving that he is at least equitably entitled to the estate, and by reason thereof entitled to be invested with the legal title?

2. The proceeding is against a local officer, and public policy demands that such officers should be protected against harassing litigations which require their absence from their posts of duty.

If a sheriff can be compelled to attend on actions brought against him for acts done *virtute officii* or for omissions of duty, at San Francisco, then the sheriff of any county is liable to be forced into the remotest county of the State, whatever the consequences might be to the county he was elected to serve.

The other points taken by the appellant are the same as in the ejectment-suit.

*Heydenfeldt & Shafter* for Respondents, in the proceeding by *mandamus*.

1. The relator is entitled to the relief prayed for, notwithstanding the deed the sheriff has already given him.

The deed of December 26, 1856, was given as consequent upon the relator's purchase of March 17, 1856. To that deed, in his

capacity of purchaser, he was entitled by a direct provision of law. On the twenty-sixth of December, Randall's right of redemption was gone, and also the right of all incumbrancers subsequent to McMillan. Still, by section two hundred and thirty-two of the Practice Act, the relator is entitled to a further deed, sixty days from the redemption having elapsed.

In the face of a direct statute provision, it is not for the sheriff to say that the deed can do the relator no service. It is at least a further assurance, to which he has a clear right by law.

2. Objection is made to the proceedings below, on the ground that the motion for a change of venue was improperly overruled.

The general rule on the subject of venue, is contained in the twentieth section of the Practice Act, which provides that "the action shall be tried in the county in which the parties, or some of them, reside at the commencement of the action."

An exception to the general rule is, however, made in favor of public officers, by the second subdivision of the nineteenth section, and the first question is, whether this case falls within the general rule, or this exception to it.

We insist that it falls within the rule.

The exception is by way of ease and favor to public officers, extending to them a privilege which is denied to citizens at large, and therefore it should not be extended beyond the just calls of the words in which the exception is stated.

The words are that an action brought against a public officer for "an act done" by him shall be tried in the county where the cause or some part thereof arose.

This is not an action brought for "an act done" by the defendant as sheriff, but to compel him to do an act, which is a very different thing, and is, therefore, not within the exception.

18 Wend., 85, *Elliot v. Crouk's Admins.*: Held that the statute requiring actions against public officers for "acts done" by them *virtute officii*, to be brought in the county where the fact complained of happened, applied only to affirmative acts, and not to mere omissions or neglect of official duty. *A fortiori* they would not extend to proceedings brought to compel the officer to do an act, as here.

13 Wend., 365, *Hopkins v. Heywood*: The same point was presented, and the same view taken.

That the "doing of an act" and an "omission to do an act" are distinct and not convertible phrases in the eye of California law, is apparent from the Statute of Limitations. Comp. Stat., 819. "An action against a sheriff, etc., upon the liability incurred by doing an act in an official capacity, and in virtue of his office, or by the omission of an official duty," etc.

Here the idea of malfeasance is kept distinct from that of nonfeasance, and no attempt even is made to express them in

the same form of words. Nor is this distinction a novel one; it is as old as the common law, and furthermore proceeds upon a real difference.

But it is insisted by the defendant that the case, if not within the exception above referred to, is still within the exception stated in the eighteenth section, subdivision first.

This suit is not brought for the distinctive purpose of recovering real property, or an estate or interest therein, nor to recover damages to real property. The complaint obviously presents no such gravamen, and neither seeks or admits of any such relief.

Neither is it brought "to determine" (as by judgment) "any right to an interest in real property."

The people claim no estate in the land, the defendant claims none, and could not, in the theory of the action, claim title to it, even though he were the absolute owner in fact, and there can be no adjudication affecting, in the slightest degree, the rights or the interests of third persons.

The relator simply claims at the hand of the defendant a particular official document. The right to that document as against the defendant, doubtless involves an inquiry into certain alleged proceedings in redemption, but there can be no judgment "determining" that the relator has any property or possessory rights in land as against the defendant, or others. Neither would the sheriff's deed to the relator be anything better than *prima facie* evidence of the fact of redemption in any suit between himself and third persons.

In such suit, the whole question would be open, and the relator would have to prove *de novo* all the conditions of a valid redemption under the statute.

In short, the effect of a judgment for the relator would be not to determine that he was the owner of the land, or had any right or interest in land, but simply to put him the more fully in a position to assert and prove a right of that character. Such is the effect generally of *mandamus*. *People v. Fleming*, 4 Denio, 143. We admit that the exception in question contemplates a proceeding between citizen and citizen, in which the plaintiff claims as against the defendant, and on any issue he may choose to make, an interest in a thing real, and where the judgment would finally settle the question as between the litigants.

This proceeding differs from that in structure, purpose, and result.

It is urged by defendant that "title-deeds are considered as part of the inheritance, and pass to the heir as real estate."

So were doves in a dove-cote, fish in a trunk, and family pictures, but neither ejectment or any of the actions real would lie for them. Detinue was the specific remedy at law, and in that action the venue was always transitory. 1 Ch. Pl., 269.

In the case cited from 4 D. & E. the action was detinue, and

the right to the papers obviously depended upon the title to the land—and thus the title to the land came collaterally in question.

In that case there was no question of venue made. If there had been, and the action had been brought out of the county where the lands covered by the deeds were situate, the suit would have been defeated, if the views of the defendant's counsel are correct. But in detinue, the venue was always transitory, and the suit would have survived the objection, had it been made.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

These three cases were argued together. The first is an action of ejectment; the second, an application for a *mandamus*; and the third, a bill in equity. In the first, judgment was rendered for the defendants; in the second, a peremptory *mandamus* was awarded; and in the third, the demurrer was sustained, and the bill dismissed. The first two cases depend upon the same question—the validity of the alleged redemption by McMillan, of the premises in controversy, from the sale under the decree of foreclosure.

The facts, as disclosed by the records, are briefly as follows: In December, 1851, Osio was the owner of the premises, which are situated in Marin county, and executed a mortgage upon them, to Bird, to secure a promissory note of three thousand dollars, payable in six months, with interest, at the rate of five per cent. a month. Bird assigned the note and mortgage to Edwards, and Edwards assigned them to Cary. In the meantime, Osio sold and conveyed the premises to Randall. In September, 1853, Cary instituted suit upon the mortgage, making Osio and Randall defendants; and in December, 1854, obtained a decree for the foreclosure of the mortgage and the sale of the premises, to satisfy the debt due, which was adjudged to be \$8,400, the amount to draw interest at five per cent. a month. From the decree, Randall appealed to the Supreme Court, where, at the April Term, 1856, the appeal was dismissed, with twenty per cent. damages. The *remittitur* having been filed in the Court below, an execution or certified copy of the decree was issued to the sheriff, by whom the premises were sold on the fourteenth of June, 1856, to Cary, for the sum of \$16,000. Cary received a certificate of the sale, which, with the balance due him on the judgment, was subsequently assigned to the defendant Hyatt, to whom, on the nineteenth of February, 1857, the sheriff executed a deed of the premises. The defendants claim under this deed.

In November, 1854, Jessie Smith recovered a judgment against Randall, in the Fourth District Court, and on the twentieth of February, 1855, filed a transcript of its docket in the office of the recorder of Marin county. Upon this judgment execution

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was issued, and the interest of Randall in the premises sold thereunder, on the twelfth of March, 1855, for \$2,000, at which sale the defendant Richards became the purchaser, received a certificate of sale, and on the ninth of February, 1856, a deed from the sheriff.

In January, 1855, the plaintiff McMillan recovered a judgment against Randall, in the Fourth District Court, for over fourteen thousand dollars, and filed a transcript of its docket in the office of the recorder of Marin county, on the seventh of February, 1855. On the twenty-first of July, 1855, the plaintiff recovered another judgment against Randall, in the Twelfth District Court, for over eight thousand dollars, and immediately thereafter filed a transcript of its docket in the same recorder's office. Upon the first judgment recovered by the plaintiff, execution was issued in January, 1856, and the interest of Randall was sold thereunder on the seventeenth of March, 1856, for \$2,000, at which sale the plaintiff became the purchaser, received a certificate of sale, and on the twenty-sixth of December, 1856, a deed from the sheriff.

On the thirteenth of December, 1856, the plaintiff, in company with his counsel, called upon the sheriff of Marin county to redeem the premises from the purchase and lien of Cary under the decree in the foreclosure case—serving, at the same time, upon the sheriff a notice of redemption, accompanied with his affidavit of the amount due upon his two judgments, and duly certified copies of their dockets. On the evening previous, the counsel of the plaintiff had requested the sheriff to prepare a statement of the amount necessary for the redemption, which he accordingly did on the following morning, making the amount \$24,126 08. This sum was paid by the plaintiff to the sheriff, with a protest as to certain specified items. The circumstances attending this payment, with the protest and subsequent suits, will be fully stated and considered in determining the question how far the payment operated as a redemption. The District Court of the Seventh District held, in the ejectment-suit, that only the sum of \$17,606 87 operated as a legal payment for the purposes of redemption, and that the same was insufficient, and gave judgment for the defendants—whilst the District Court of the Twelfth District held, that a redemption was effected, and ordered a peremptory *mandamus* to the sheriff of Marin county, to execute a deed to the plaintiff as redemptioner.

The first question presented, relates to the right of redemption by the plaintiff. This right is denied by the defendants, and in support of their position, they contend, *first*, that the legal title to the premises passed to the mortgagee, upon the execution of the Osio mortgage, leaving in the mortgagor only an equity of redemption; *second*, that by the decree in the mortgage case, the equity of redemption was entirely barred and foreclosed, and

the estate became absolute in Cary, the assignee of the mortgage; *third*, that the judgments of the plaintiff having been recovered after the decree of foreclosure, did not attach as liens upon the premises; and, *fourth*, that even if liens by the judgments originally attached, they were subsequently lost; the lien of the first judgment by the sale on the execution, although a part only of the judgment was satisfied by such sale; and the lien of the second judgment, by the sale under the Smith judgment.

There is great diversity of opinion in the adjudged cases as to the rights of mortgagor and mortgagee, both before and after condition broken, arising from the different views taken of mortgages at law and equity, and the more or less extended application of equitable doctrines to contracts of this description in Courts of Law. In England, a mortgage is regarded in law as a conveyance, vesting in the mortgagee, upon its execution, a conditional estate, which becomes absolute upon breach of its condition, and of course carrying with it all the rights and incidents belonging to the ownership of property. Thus, the mortgagee, unless restrained by stipulations in the mortgage, is there entitled to immediate possession of the land, and may enter peaceably, or bring ejectment; and his right to possession can not be defeated, except by payment at the period fixed by the terms of the mortgage. Payment, subsequent to that period, only gives an equity of redemption, and a re-conveyance is necessary to vest the title in the mortgagor. (Coote on Mort., 389; Greenleaf's Cruise, 2 vol., 91.) The same doctrine prevails in several of the States. Thus, in *Doe v. Grimes*, (7 Black., 1,) the Supreme Court of Indiana held that an action of ejectment would lie by the mortgagee against the mortgagor, before default. "The law, we think," said Sullivan, J., "is well settled that the mortgagee, by virtue of his mortgage, becomes the legal owner of the premises, and is consequently entitled at law to the immediate possession, unless there be an agreement between the parties, expressed in the contract, or plainly inferrible from it, that the mortgagor shall remain in possession." (*Blaney v. Bearce*, 2 Greenl., 137; *Newall v. Wright*, 3 Mass., 139; *Coleman v. Packard*, 16 Mass., 39.)

But in equity, both in England and the United States, a mortgage is regarded in a very different light. The settled doctrine of equity is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or incumbrance, and that the equity of redemption is the real and beneficial estate in the land which may be sold and conveyed by the mortgagor, in any of the ordinary modes of assurance, subject only to the lien of the mortgage. This equitable doctrine, established to prevent the hardships springing by the

rules of law from a failure in the strict performance of the conditions attached to the conveyance, and to give effect to the just intent of the parties in contracts of this description, has been, in most of the States, gradually adopted by the Courts of Law, although in some instances to a limited extent only (4 Kent, 160.) The cases indicate a fluctuation between equitable and common law views of the subject; and a hesitation by the Courts of Law to carry the equitable doctrine to its legitimate results. (*Gray v. Jenks*, 3 Mason, 521.)

"Unless the different purposes of a mortgage are adverted to," observes Parker, C. J., in *Smith v. More*, (11 N. H., 59,) "there would appear to be much confusion in the books relative to the rights of the mortgagor and mortgagee; and with those purposes in view, an attempt to reconcile them would be made in vain."

The law concerning estates in dower, referred to by the defendants' counsel, furnishes an illustration of the change which the original character of mortgages has undergone. To entitle a widow to dower, the seizin of the husband must have been more than an equitable seizin; it must have been a legal seizin of the estate of inheritance. In the case of *Steele v. Carol*, (12 Peters, 204,) Taney, C. J., said "that, according to the principles of the common law, a widow is not dowable in her husband's equity of redemption; and if a man mortgages in fee before marriage, and dies without redeeming the mortgage, his widow is not entitled to dower." But in the case of *Collins v. Torrey* (7 John., 277), it was adjudged that the estate of the mortgagor is the real estate at law, and that the widow of the mortgagor may recover her dower out of the land mortgaged, the Court saying: "We have in this State (New York) gone greater lengths than the precedents in the English books towards a recognition of the mortgagor's estate at law."

In *Runyan v. Mersereau*, (11 John., 538,) which was an action of trespass, the question presented was, whether the freehold was in the plaintiff, who had purchased the equity of redemption under a judgment against the mortgagor, or in the defendant, the mortgagee, whose mortgage was prior to the judgment; and the Court held the freehold to be in the plaintiff, and said: "Mortgages are not considered as conveyances of land, within the Statute of Frauds, and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage."

In *Jackson v. Bronson*, (19 John., 325,) the mortgagor sustained ejectment against the grantee of the mortgagee, and the Court said: "It is now well settled, that the mortgagee has a mere chattel interest, and the mortgagor is considered as the proprietor of the freehold. The mortgage is deemed a mere incident to the bond, or personal security for the debt, and the assignment

of the interest of the mortgagee in the land, without an assignment of the debt, is considered in law as a nullity."

In *Gardner v. Heartt*, (3 Denio, 234,) Beardsley, J., says: "A mortgage creates a specific lien on the land mortgaged, as a judgment duly docketed does a general one on the land of the judgment-debtor. But the mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt; title to the land, notwithstanding the mortgage, remaining in the mortgagor."

In *Waring v. Smith* (2 Barb. Ch. Rep., 135,) Chancellor Walworth said: "Before the adoption of the revised statutes, it was settled by the Courts of this State, that the mortgagor was to be considered as the real owner of the fee, of the lands mortgaged, except for the mere purpose of protecting the mortgagee as the holder of a security thereon for the payment of his debt. And the revised statutes have restricted the legal rights of the mortgagee still further, by depriving him of the power to bring a suit to recover the possession of the mortgaged premises before a foreclosure. The only right he now has, in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. The mortgage, then, is here nothing but a chose in action, or a mere lien or security upon the mortgaged premises, as an incident to the debt itself." The cases cited above, from Johnson's Reports, were decided several years previous to the adoption of the revised statutes referred to by the Chancellor. A provision, more extensive in effect than the New York statute, is embodied in our Practice Act. Section 260 reads as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." This section takes from the instrument its common law character, and restricts it to the purposes of security. It does not, it is true, in terms, change the estates at law of the mortgagor and mortgagee, but, by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine, upon a consideration of which the section was evidently drawn. An instrument which confers no right of either present or future possession, possesses little of the character of a conveyance, and can hardly be deemed to pass any estate in the land.

The just and liberal doctrines of equity respecting mortgages have been adopted in this State, and asserted, either directly or indirectly, in repeated instances, by this Court. In *Godeffroy v. Caldwell*, (2 Cal., 493,) it was said that "mortgages at the present day are considered as merely securities for the payment of

money, and no breach of their conditions can possibly vest the title in the mortgagee."

In *Peters v. Jamestown Bridge Company*, (5 Cal., 336,) the mortgagee, Perry, had conveyed the property to one person, and assigned the mortgage to another. The plaintiff was the grantee of the property, and the defendants were assignees of the mortgage. The defendants commenced an action to foreclose the mortgage, and obtained a decree, and were proceeding to sell the property when the plaintiff brought suit, enjoining them from further proceedings, on the ground that the sale would create a cloud upon his title. The Court below decreed a perpetual injunction, and upon appeal to this Court, the decree was reversed; and Heydenfeldt, J., said: "The deed from Perry to plaintiff could not operate as an assignment of the mortgage. The latter is a mere security for the debt, and cannot pass without a transfer of the debt; so it would seem that the two transactions are totally different in character; the intent of the one is to convey the title to land; of the other, to transfer a debt with its security. If a contrary doctrine was maintained, it would produce the evil (as in this case) of enabling a net to be thrown for the entrapment of the innocent."

In *Bennett v. Taylor et al.*, (5 Cal., 502,) the facts are not stated, but it would appear from the opinion that exception had been taken to the introduction in evidence of a mortgage, without first producing or accounting for the note to secure which it was given, and Murray, C. J., said: "The mortgage was a mere incident to the debt, and in order to maintain the action, which was founded on the plaintiffs' possession and the mortgage, the debt should have been proved."

In *Ord v. McKee*, (5 Cal., 515,) the Court said: "A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment. Ord, having the right to the note, had undoubtedly a right to foreclose the mortgage."

In *Guy v. Ide*, (6 Cal., 99,) the plaintiff had obtained an order appointing a receiver of the rents and profits of the mortgaged premises, pending a suit to foreclose the mortgage. On appeal, this Court, per Terry, J., said: "Our statute forbids a mortgagee from recovering the mortgaged estate, and confines his remedy to a foreclosure. The same reason does not, therefore, exist, as by the English rule, for appointing a receiver to collect the rents and profits, pending the litigation. The mortgage is considered as only the security for the debt; the estate remains that of the mortgagor, in the character of owner, and must continue to remain so, with all the incidents of ownership, until, by a foreclosure and sale, a new owner is substituted."

In *Phelan v. Olney*, (6 Cal., 478,) the doctrine of *Ord v. McKee*, and *Bennett v. Taylor*, was affirmed. In *Belloc v. Rogers*, (9

Cal. Reports,) Burnett, J., said, *arguendo*: "At common law, a mortgage vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent. But this theory is entirely changed by our system, and the legal title remains with the mortgagor, subject to be divested by a foreclosure and sale."

The decisions of this Court, from which the above citations are taken, were made, with one exception, in equity cases; but the language of the Court does not appear, in any instance, to have been governed by a consideration of the tribunal in which the remedy was sought, but entirely from a consideration of the nature of the contract.

The mortgage being a mere security for a debt, it must follow that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. Indeed, in those Courts, with some few exceptions, where the common law view of mortgages is the most strictly adhered to, payment of the debt is held to re-vest the estate without a re-conveyance in the mortgagor, though it is difficult to see upon what principle. If the mortgage is a conveyance after default, it must be equally so before; the only difference being that, in the one case, the estate conveyed is conditional, and in the other absolute. If, after default, the estate be absolute, it is not easy to perceive how the grantee can be divested without deed under the Statute of Frauds; and yet, according to the general doctrine of the modern cases, payment has that effect. This is one of the inconsistencies arising from a partial adoption of the equitable doctrines by the Courts of Law.

In truth, the original character of mortgages has undergone a change. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They pass no estate in the land, but are mere securities, and default in the payment of the money secured does not change their character.

Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England, and in several of the States, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this State can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure-suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises, for its satisfaction, the surplus, if any, going to subsequent incumbrancers or the owner of the premises, and execution following for any.

deficiency. And by the decision of this Court, in *Kent & Cahoon v. Laffan*, (2 Cal., 595,) the statutory right of redemption is held equally applicable to sales under decrees in mortgage cases, as to sales under ordinary judgments at law. Whether this decision would be now made, were the question an open one, it is unnecessary to determine. It has been repeatedly recognized as law by this Court, (*Harlan v. Smith*, 6 Cal., 173,) and has been acted upon by parties for years; rights of property have been acquired under it, which we are not at liberty at this day to disturb. By this decision, the estate of the mortgagor and of the judgment-debtor after sale, stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it. The decisions as to the estate of the judgment-debtor, after sale, become, therefore, authorities for determining the estate of the mortgagor after sale under decree; and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment-debtor, and that the conveyance, when executed, will take effect, in the one case, from the date of the mortgage, as it does in the other from the time the lien of the judgment attached.

By a statute of New York, passed in 1820, any creditor was entitled to redeem premises sold under execution, if he had a lien, upon them by a decree in chancery or judgment at law, rendered before the expiration of fifteen months from the date of the sale. Under this act the question was raised in the Courts of that State as to the estate of the purchaser previous to the execution of the conveyance, and as to the effect, as liens, of decrees and judgments recovered after the sale; and it was held that until the deed was executed, the purchaser had a lien only on the land, (*Bissel v. Payne*, 20 John., 3;) that the estate of the debtor was not changed by the sale and certificate of the sheriff, and the purchaser acquired no title until the conveyance was executed, (*Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 511;) that the existence of the judgment at the time of the sale was not essential to the lien; that it became a lien, if recovered within the fifteen months after sale. (*Van Rensselaer v. Sheriff of Onondaga*, 1 Cowen, 443,) even though the judgment were confessed for the express purpose of enabling the creditor to redeem. (*Snyder v. Warren*, 2 Cowen, 518.)

There is no difference, so far as the liens of the judgments are concerned, between our statute and that of New York. Here the statute requires the lien by the judgment of the creditor to be *subsequent* to that on which the property is sold; there the statute requires the judgment which creates the lien to be recovered *before* the expiration of the time of the redemption. The period within which the judgment creating the lien must be recov-

ered is not limited in either case by the sale; and in *Kent & Cahoon v. Laffan*, the judgment under which a redemption was claimed was recovered after the sale of the premises under the decree of foreclosure, although this fact does not appear in the report of the case.

It follows, from the views above expressed, that the legal title of the premises remained in Randall after the sale, under the decree of foreclosure, and that the plaintiff acquired a lien by his judgments; the lien of the first judgment attaching on the 7th of February, 1855, and of the second on the 21st of July of the same year. The lien of this last judgment was extinguished by the sale under the Smith judgment, made on the 12th of March, 1855, followed by a conveyance from the sheriff, which, by relation, took effect on the 20th of February, 1855, when the judgment became a lien. The second judgment of the plaintiff could not, therefore, be available as a basis of redemption on the 13th of December, 1856; and the right of the plaintiff to redeem, as a creditor, must rest upon the first judgment. Upon this judgment, execution had been issued, and the premises sold to the plaintiff on the 17th of March, 1856, for two thousand dollars; and it is objected by the defendants that this sale extinguished the lien of the judgment for the residue.

The question raised by this objection is not a new one. It was before the Court, in *Vandyke v. Harman*, in 1853. (3 Cal., 296.) In that case, the plaintiff was the holder of a mortgage to secure a note of \$1,500, and obtained judgment for the amount, and a decree for the sale of the mortgaged premises. At the sale he became the purchaser for \$1,000. The respondents, who were creditors of the mortgagor, having a lien upon the premises, paid to the sheriff the amount bid by the plaintiff, with eighteen per cent. thereon, and interest to the date of the redemption, and claimed a deed. This the sheriff refused to execute, and the respondents applied to the Court below, and obtained a *mandamus* to compel its execution. On appeal, the judgment was reversed, and the Court, per Heydenfeldt, J., said: "The sum paid to the sheriff to redeem the land, was insufficient for that object. The whole amount of Vandyke's judgment, with interest, should have been paid. The language of the statute is explicit. If the interpretation insisted upon by the respondents be correct, that by the purchase of the property the lien of the creditor purchasing is gone, even for the purpose of redemption, then the statute would have no meaning whatever."

The same question was before this Court for consideration in *Knight v. Fair*, (9 Cal.) and the decision in *Vandyke v. Harman* was affirmed. In *Knight v. Fair*, the plaintiff was the owner of a judgment, and the purchaser of the real property sold. The successor in interest paid to the purchaser an amount greater than his bid, but less than the amount due on

the judgment, and the payment was held insufficient for a redemption. In the opinion in the case, Burnett, J., said: "The two hundred and thirty-first section of the Code allows the judgment-debtor, or a redemptioner, to redeem within six months after the sale, by paying the purchaser the amount of his purchase, with eighteen per cent. thereon, in addition, together with any assessments or taxes, and interest on such amount; and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien, with interest."

"It is certain, from this explicit language, that the *purchaser* may have a *lien* upon the property *prior* to that of the redemptioner. The fact that he is the *creditor* does not divest his lien. He may be both a creditor and a purchaser, and still have a *prior* lien to that of the redemptioner. This can only be upon the principle that the legal estate is still in the judgment-debtor until the delivery of the sheriff's deed; and, if in the debtor, it is such an estate as may be the subject of a lien, a sale under execution, or of a conveyance by deed from the debtor. \* \* \* We are compelled to give the statute this construction. If we do not, it has no meaning."

The cases cited by the counsel of the defendants from the New York Reports, are not in conflict with the decisions of this Court. In *Hewson v. Deygert*, (8 John., 333,) the purchaser was not the owner of the judgment. The premises were bid in by a third party. In such case, the purchaser must take the property discharged of the lien of the judgment, otherwise no one would be safe in purchasing at a sheriff's sale for a sum less than the full amount of the judgment, as the property in his hands would be subject to re-sale, as often as any balance remained unsatisfied. This is a very different question from the one involved in *Vandyke v. Harman*, and in *Knight v. Fair*, where the owner of the judgment became the purchaser. Besides, the only point decided in *Hewson v. Deygert* was, that the Court would not interfere, in a summary way, by rule, to stay a second sale of the premises under the same judgment, the party with the title having a remedy by action in case of injury; and as to the effect of the sale in discharging the lien on the judgment, the Court states expressly that it only *intimates* its impression, and gives "*no decided opinion*."

In 1820, the Legislature of New York provided, in the statute which authorizes redemptions, that "the plaintiff, under whose execution any real estate shall have been sold, shall not be authorized to acquire the title of the original purchaser, or of any creditor to the premises so sold, by virtue of the decree or judgment on which such execution issued," (2 R. S., 373, § 58,) and the decisions cited from Cowen and Wendell were made years afterwards. In *Ex parte Stevens*, (4 Cowen, 133,) the owner of the judgment was not the purchaser, and the decision was made

in view of the provision of the statute, as is evident from the syllabus of the reporter. In *People v. Easton*, (2 Wend., 297,) the sale under the execution was made for a sum exceeding the judgment, which was thus satisfied. The owner was, of course, no longer a creditor having a lien.

It is further insisted by the counsel of the defendants, that the time of redemption, under the sale upon the judgment of the plaintiff, having expired on the 17th of September, 1856, Randall became thereby divested of all interest in the premises, and there remained no interest in him on the 13th of December, upon which the judgment could subsist as a lien. The answer to this is, that the title remained in the debtor until conveyance executed. Until then, the purchaser had no legal estate in the premises, but only a right to an estate which might be perfected by conveyance. This point was expressly decided in *Smith v. Colvin*, (17 Barb., 161.) That was an action of ejectment, and it was objected to the plaintiff's recovery that his legal estate had become divested by a sale on execution and the expiration of the time of redemption before trial, and the Court said: "This ground is untenable, because the sale had not been consummated by sheriff's conveyance. \* \* \* The title does not pass by filing the sheriff's certificate, which only operates as a lien by way of action to protect the purchaser against intervening claims, except the right of redemption. Nor does the estate of the debtor become vested in the purchaser by mere lapse of the time of redemption, but only, as we think, by the sheriff's conveyance under the statute." (*Vaughn v. Ely*, 4 Barb., 159.)

The case of *Wright v. Douglass*, (2 Comstock, 373,) does not, when properly considered, conflict with *Smith v. Colvin*. The decision in that case was based upon the effect, under the statute of New York, of an attachment upon the equitable interest of the debtor in land.

The objection of the defendant goes to the capacity in which the plaintiff undertook to redeem, and not to his right of redemption. If the lien of the judgment was extinguished by the lapse of the time of redemption, then the plaintiff was the successor in interest of Randall, and as such, was equally entitled to redeem.

We do not perceive the force of the objection, that the operative effect of payment, as a redemption, is to be determined by the capacity in which a party entitled to redeem presents himself before the officer. It can make no difference to the purchaser, whether the money is paid by the plaintiff as successor in interest, or as creditor having a lien.

The next question for consideration is, whether the payment of \$24,146 08, made on the thirteenth of December, 1856, operated as a redemption of the premises. The circumstances occurring at the time are detailed in the testimony of the sheriff, set forth in the findings of the Court. From this it appears that

on the evening previous, the plaintiff, by his counsel, informed the sheriff of his intention to redeem the premises, and requested the officer to make out a statement of the amount necessary to be paid for the redemption. To this the officer, after some objection, assented, and on the following day made out the amount at \$24,146 08. What then took place is thus stated by the officer: "Mr. Shafter said that was too much; that the amount required would not amount to seventeen thousand dollars, but he would pay whatever sum I demanded, and insisted I should name the amount. *He paid me the amount, twenty-four thousand one hundred and forty-six dollars and eight cents*; he protested against paying the amount; said it was too much; it was, at the same time, in the office; he requested me to give a statement of the items, as I figured it up; there was a written protest served at the time Shafter asked me for the certificate; I think he prepared the certificate; I signed it; Shafter told me probably that was not the end of the matter, and requested me to deposit in Garrison & Co.'s, to save the interest during the litigation. About one week after, I deposited a portion with Tallant & Wilde, and a portion with Parrott & Co. \* \* *I mean by protest, only that he said the sum was too much.* The written protest was after I had counted the money, and found it correct. I read the certificate, and signed it; can't say whether certificate was executed before protest or after. \* \* I knew it to be correct. I selected my own bankers; Shafter advised me as to Parrott. *There was no arrangement about the money.* Shafter said a portion of the money was borrowed of Garrison & Co."

The written notice of protest, referred to in the testimony of the sheriff, specified the items to which objection was made. After the payment, as described above, and at the same interview, the plaintiff requested the sheriff to deposit the money with Messrs. Garrison & Co., bankers, San Francisco, assigning as a reason that a part of the same had been loaned by them at two per cent. per month, and would probably be tied up by litigation for several months, and by such deposit the interest could be provided for. On the twentieth of December, the sheriff proceeded to San Francisco, from Marin county, and deposited a portion of the money with Tallant & Wilde, and a portion with Parrott & Co., receiving certificates of deposit for the same. Whilst the sheriff was in San Francisco, the plaintiff commenced a suit against him for the recovery of ten thousand dollars, as for money had and received to his use, and issued an attachment, and, according to the statement of the Court in its finding, "caused the money so deposited to be attached in the hands of the bankers to satisfy any judgment which he might recover in the action," and which "money remained so attached at the commencement and trial" of the ejectment-suit. Afterwards, on the seventeenth of February, 1857, the plaintiff filed a bill in

equity, upon which an injunction was issued and served, restraining the bankers from using or paying out the moneys deposited, and the sheriff from negotiating the certificates of deposit. In the bill, which was duly verified, the plaintiff alleged that the sum of \$6,700, left with the sheriff, was not due and payable as a portion necessary for the redemption, and that the sheriff had no right to the same. The suit in equity was undetermined, and the injunction in force at the commencement and trial of the ejectment case.

Upon these facts, the defendants contend that no redemption was made, and this involves the consideration of the effect of the protest upon the payment; the effect of the attachment upon it; and the effect of the injunction.

The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal. It is notice, only, to the party receiving the payment, that, if the demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion.

In *Fleetwood v. The City of New York*, Sandford, J., said: "The legal effect of the payment is not impaired by the protests made. When a party pays under duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right enforced by the adverse party. But where there is no legal compulsion, a party yielding to the assertion of an adverse claim, cannot detract from the force of his concession by saying I object, or I protest, at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim." (See, also, *Chase v. Dwinall*, 7 Greenl'f, 134; *Clinton v. Strong*, 9 John., 370.)

It is unnecessary to decide whether the protest in the present case can be available for any purpose. It is of no consequence whether the payment was voluntary or otherwise. It was absolute, untrammelled by conditions. "There was no arrangement," testifies the sheriff, "about the money." Complaints of the amount required, objections in the words "I protest," whether made orally or in writing, were not clogs upon the absolute dominion of the officer over the money. He could have paid the same to the purchaser immediately, or on the following day, or

at any time during the week. He received the money on the 13th, and no proceedings were taken against him for the alleged excess until the 20th.

The attachment could not impair the legal effect of the judgment. It was not a recaption of the money; nor even a lien upon it. It is true, the Court finds that the plaintiff caused the money in the hands of the bankers to be attached, and that the attachment remained upon it at the trial of the ejectment-suit; but this finding is inconsistent with, and negatived by, the previous finding that the bankers had already issued certificates of deposit to the sheriff for the money. These certificates are presumed to be in the ordinary form; it is not found that they were special and restricted in their character; they were then negotiable instruments under the statute, according to the decision of this Court in *Welton v. Adams & Co.*, (4 Cal. R., 27; Compiled Laws, 146.)

The bankers, by the certificates, became liable, not to refund to the sheriff the specific money deposited, but to pay its amount to the holder of the certificates, on their presentation. After their issuance, there was nothing in the possession of the bankers belonging to the sheriff upon which an attachment could fasten. There remained merely an obligation to pay the holder of the certificates, whoever he might be. (*Sheets v. Culver*, 14 La., 449; *Kimbal v. Plant*, *Ibid.*, 511.) Whether the certificates could have been reached by any proceedings under attachment whilst in the hands of the officer, it is unnecessary to determine. No such proceedings were taken, and it is sufficient that the money deposited could not have been affected by the attachment. In the argument of counsel, the character of the suit seems to have been lost sight of. The suit is not based upon any supposed present interest of the plaintiff in the specific money paid on redemption; it involves no assertion of title, but proceeds upon the relation of creditor and debtor. The complaint in the action alleges an indebtedness, and the words "had and received to the plaintiff's use," are put as the consideration upon which to support the *assumpsit* on the part of the defendant. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiff's use. The argument attempted to be drawn from the technical language to qualify the payment, is based upon a misconception of the nature of the action, and the character of the pleadings in it.

The bill upon which the injunction was issued, alleges the facts in relation to the redemption of the premises, and the subsequent deposit of the money with bankers in San Francisco, and the issuance of certificates by them, and as distinct grounds of the equity jurisdiction avers the irresponsibility of the sheriff and his sureties, and sets forth the various pretences of Hyatt, that the re-

demption was imperfect and abortive; that the judgment under which it was made was fraudulent and void; that the amount paid was insufficient for redemption, or ineffectual, by reason of the protest, all of which pretences, it says, are false in fact; and further avers that Hyatt has induced the sheriff, by giving a bond of indemnity, to execute to him a deed of the premises, and yet insists that in case the redemption should prove effectual, he will be entitled to the sum of \$24,146 08. The bill concludes with a prayer for the injunction above mentioned, and that a receiver be appointed to take the custody of the certificates, and to hold the same for the purposes of the suit, and to invest the funds at interest, pending the litigation; that an account of the money paid under protest, be taken, and that the excess, above the amount essential to effect a redemption, be decreed to be paid to the plaintiff, and in the event the Court should adjudge, for any reason, the redemption to be inoperative, then that the whole sum be decreed to the plaintiff; but in the event the redemption should be adjudged valid, then that so much of the amount as was essential for the redemption, be paid to the parties entitled thereto.

To the bill the defendants demurred; some of them on the ground that it did not show any redemption by the plaintiff; and the others, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained on this last ground, and the bill dismissed.

The facts stated in the bill do not constitute a case for the cognizance of a Court of Equity. It does not present a case of trust. If the redemption was invalid, the plaintiff is entitled to the whole of the money; but if valid, and there was any excess in the payment, he is entitled to such excess, assuming (for we do not attempt to decide the question) that the payment of such excess was by compulsion. In either case, the remedy at law is ample. Whatever hypothesis is taken, the sheriff can only be a debtor, either for the whole amount, or for the excess, and his insolvency is no ground for the interference of a Court of Equity. The demurrer was, therefore, well taken.

As there was no ground for the equity-suit, it can have no effect upon the validity of a transaction which was closed on the thirteenth of December previous, except as evidence of the intent of the parties at the time. And, neither from the language, or scope and purpose of the bill, can any inference be drawn against the absolute and unconditional character of the payment. It contains not a word which can be tortured into an admission against the claim of the plaintiff. That the parties entitled to the money may have been injured by the injunction, is possible; but they have their remedy on the injunction-bond. In *Ex parte Newall*, (4 Hill, 589) the creditor paid, unconditionally, to the sheriff the requisite amount for redemption, and immediately

thereafter served an injunction in his own favor, restraining the sheriff from paying it over, and it was held, nevertheless, that he was entitled to the sheriff's deed. The bill in that case was filed, and the injunction obtained in advance, forbidding the sheriff from paying over the money, which the creditor might pay to effect the redemption, until the further order of the Court of Chancery, and it was objected that, in consequence of the service of the injunction there was no redemption; but the Court, by Bronson, J., said: "Whether the injunction was properly issued or not, is a question for the Court of Chancery. Assuming that it was regular, and that the money is stayed in the hands of the sheriff, we are still of opinion that there was a good redemption by Addington. He made an unconditional payment of the amount of the bank-judgment, and the sheriff received and receipted the money before the injunction was served. The redemption was then complete, and subsequent service of process to stay the money in the hands of the sheriff, could not undo what had already been well done. It is not like the case of a tender, trammelled with conditions, or an offer of payment without parting with the money.

This authority is conclusive on the point in the case at bar. After a careful consideration of the objections of the learned counsel of the defendants, we are of opinion that the redemption of the thirteenth of December, 1856, was complete; and the subsequent attachment and injunction-suits could not undo what was then well done.

In the *mandamus* case there is the further objection raised by the defendants, not involved in the determination of the other cases—that the proceedings were taken in the wrong county. The deed of the twenty-sixth of December was executed to the plaintiff in his capacity as purchaser. Sixty days having elapsed from the time of his redemption from the sale under the decree of foreclosure, he became entitled to a further deed as redemptioner, under section two hundred and thirty-two of the Practice Act, and the proceedings were taken in the District Court of San Francisco, to compel the execution of the deed.

The county where a cause is to be heard is to be determined, with some specified exceptions, by the residence of the parties. The general rule under the statute in force at the time these proceedings were instituted, is contained in section twentieth of the Practice Act, which provides that the action shall be tried in the county in which the parties, or some of them, reside at its commencement. This case is not embraced by any of the exceptions, and, therefore, falls within the general rule. The second subdivision of section nineteenth, which provides that actions against a public officer for *acts done* by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer,

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People v. York.

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by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. (*Elliott v. Cronks*, Adm., 13 Wend., 35; *Hopkins v. Heywood*, Ib., 265.) Nor does the proceeding involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights, or in any respect affect the interests of third parties. The objection, therefore, to the county, is untenable.

It follows, from the views we have taken of these cases, that the judgment in the ejectment case must be reversed, and the judgments in the other two cases affirmed. In the ejectment case, all the facts are found by the Court below; and it is the settled practice of this Court, since the decision of *Holland v. The City of San Francisco*, to direct in such cases upon a reversal, the entry of the judgment warranted by the facts found. In *McMillan v. Richards et al.*, therefore, the judgment is reversed, with directions to the Court below to enter judgment in favor of the plaintiff for the possession of the premises described in the complaint, and the recovery of the damages assessed, for their use and occupation. In the other two cases the judgment is affirmed.

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THE PEOPLE v. YORK.

As a general rule in criminal cases, this Court will not review, on appeal, an order refusing a new trial moved for on the ground that the verdict is against the evidence, unless the record contains a statement setting forth all the material portions of the testimony.

But when the record states that it gives "in substance all that was proven on the part of the State," it is sufficient. The facts, as proved, being given, there is no necessity of setting forth the testimony.

APPEAL from the Court of Sessions of the County of Yuba.

*Charles H. Bryan* for Appellant.

*Williams, Attorney-General*, for the People.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The defendant was indicted, tried, and convicted, in the Court of Sessions of Yuba county, of an assault with intent to commit murder. A motion for a new trial, on the ground that the verdict was against law and the evidence, was made and overruled, and the defendant appealed.

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Drum v. Whiting.

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The indictment charges the assault to have been committed with a knife upon the person of one Ira Marsh, the prosecuting witness in the case. The record purports to give the substance of all that was proved on the trial on the part of the prosecution; and it appears that the defendant, whilst in a state of intoxication, put one hand around Marsh, and struck a blow with the other *hand*, in which was held a scabbard, with a handle apparently of a knife; but it does not appear that the blow was struck with any violence, or that it produced any injury, or that any attempt was made to use the knife or other weapon which the scabbard might have contained; and the previous relations between the defendant and the witness, up to the *moment* of the commission of the assault, were of a friendly character.

The loose expression of the defendant, that but for the scabbard on the knife, he could or would have killed the witness, evidently referred to the consequences of a blow with the weapon unsheathed, and not to his intent at the time. The facts, as detailed in the record, fail entirely to support the verdict, and as there was no conflict of testimony in the case, a new trial should have been granted.

On a motion for a new trial in a criminal case, on the ground that the verdict is against the evidence, it is usual to set out in the statement on which the motion is made, all the material portions of the testimony, and as a general rule this Court will not review, on appeal, an order refusing a new trial on that ground, unless such testimony is contained in the record. In the present case, the testimony is not set forth, but the record states that it gives "*in substance all that was proven on the part of the State.*" This is sufficient; the facts, as proved, being given, there can be no necessity of setting forth the testimony.

Judgment reversed, and cause remanded for a new trial.

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DRUM v. WHITING.

In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified, may be stricken out on motion; and application for judgment, as upon a default, may be made at the same time.

Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out and for judgment after the answer is filed.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

The facts appear in the opinion of the Court.

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Sublette v. Tinney.

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*Bryan & Filkins* for Appellant.*I. S. & W. C. Belcher* for Respondent.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The original and amended complaints filed in this action were both duly verified under section fifty-one of the Practice Act. The answer of the defendant was unaccompanied with any verification, and on motion, was for this reason stricken out, and judgment ordered for the plaintiff as upon a default. From the judgment, the defendant appealed, and now assigns the ruling on this motion as error.

The only reason offered for want of a verification, was the residence of the defendant in another county, at a great distance from the place of trial, and consequent inability of counsel to obtain his affidavit at the time it became necessary to file the answer. This reason might have been sufficient ground for an extension, by the Court, of the time to answer, but could be of no avail in resisting the motion after the answer was filed. The language of the statute is imperative, and makes only one exception in which the verification of an answer may be omitted when the complaint has been duly verified, and that is, when the admission of the truth of the complaint might subject the party to a prosecution for a felony. (Practice Act, §§ 51, 52.) In all other cases, an answer, without a verification to a complaint duly verified, may be stricken out, on motion; and application for judgment, as upon a default, may be made at the same time. (Strout et al. v. Curran, 7 Howard's Practice Reports, 36.)

Judgment affirmed, with five per cent. damages.

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### SUBLETTE v. TINNEY *et al.*

In an action for relief on the ground of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable.

If the plaintiff wishes in such a case to bring himself within the exception of the statute, he must allege the fact of a discovery of the fraud at a period bringing him within the exception.

When it appears upon the face of a bill in equity that the suit is barred by lapse of time, the defendant may demur.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

This was a bill in chancery brought to rescind a contract, on the ground of fraud.

To the bill a demurrer was interposed on the ground that the action was barred by the Statute of Limitation.

The Court below sustained the demurrer and dismissed the bill; and from its ruling the plaintiff appealed.

*Francis J. Dunn* for Appellant.

The action was not barred by limitation under our statute, and as the cause for which plaintiff sought relief was continuous from the time of the taking possession by defendants when the contract was made, down to the time of the commencement of the suit, no limitation could run. *Pratt v. Vather*, 9 Pet., 405; *Hawley v. Crane*, 4 Com., 717; *Coleman v. Lynn*, 4 Rand., 454; *Johnson v. Johnson*, 5 Ala., 90; *Mitchell v. Thompson*, 1 McLean's, 96, 146; *Shields v. Anderson*, 3 Leigh, 729; *Prescott v. Hubbell*, 1 Hill Chy. R., 210; *Cram v. Prattier*, 4 J. J. Marsh., 75; *Raymond v. Simpson*, 4 Blackf., 77; *Provost v. Graty*, 6 Wheat., 481; *Mitchell v. Girard*, 4 How., 503; *Ward v. Van Bokelyn*, 1 P. Ch. R., 100; *Brown v. Brown*, 1 Harp. Ch., 270.

There is no rule in equity that limits the time of the commencement of actions thereon to three years and three months, within which time this suit was brought.

*John R. McConnell* for Respondents.

The complaint sets forth the agreement or contract containing the transfer. It bears date January 21, 1854. This was the contract of sale. The cause of action accrued upon its execution. This suit was brought on the second day of March, 1857—over three years after the cause of action accrued. It is therefore barred by the Statute of Limitations.

The defence of the Statute of Limitations is as available in equity as at law. It may be taken advantage of by demurrer if it appears upon the face of the bill; and, if plaintiff be within any exception of the statute, it is incumbent on him to state it in the bill. *Story's Eq. Pleadings*, §§ 484, 751, 756; *Hoare v. Peck*, 6 Simons R., 51; *Humbert v. Rector Trin. Church*, 7 Paige, 197, 198; *Smith v. Clay*, *Ambler's R.*, 645.

The only cases in which the Statute of Limitations has been held not to govern Courts of Equity, are those cases in which there is no legal remedy whatever; as in case of such trusts as can only be enforced in equity.

But it is absolutely settled that whenever a legal right of action exists in regard to the subject-matter of the suit, a Court of Equity will be governed by the analogy of the law.

FIELD, J., delivered the opinion of the Court—BURNETT, J., concurring.

The plaintiff seeks a rescission and cancellation of a contract entered into between himself and the defendants, Tinney and

Casey, for the sale of certain interests in mining-claims; and, as the ground for the relief sought, alleges a false and fraudulent representation by them of the ownership and possession of the mining interests which they had agreed to transfer to him, and the transfer of which constituted the principal inducement to the contract. To the complaint the defendants demurred, relying, among other grounds, upon the Statute of Limitations. The contract was executed, and bears date on the twenty-first day of January, 1854, and this suit was commenced on the second of March, 1857. The seventeenth section of the Statute of Limitations provides that certain actions must be commenced within three years; and among others, "an action for relief, on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

The cause of action cannot be deemed to accrue upon the discovery of the fraud, in any other sense than that the statute will not be deemed to commence running until such period. Fraud is the substantive cause of action; upon its commission the right of action arises, not upon its discovery. The policy of the law is, that actions on this ground should be commenced within three years; but, that innocent parties may not suffer whilst in ignorance of their rights, the statute excepts them from the limitation until a discovery of the fraud. The latter clause of the section must, therefore, be construed as an exception merely to the general provision, and be pleaded as such. In the present case, then, the cause of action accrued upon the execution of the contract. As this was more than three years previous to the commencement of the suit, the cause of action was barred, and the objection being apparent upon the face of the complaint, could be taken advantage of by demurrer. If the plaintiff was within the exception of the statute, it was incumbent upon him to state it in his complaint. (Story's Equity Pleadings, §§ 484, 751; Hoare v. Peck, 6 Simons, 51; Kane v. Bloodgood, 7 John. Ch., 113.)

In *Humbert v. The Rector of Trinity Church*, (7 Paige, 197,) the defendants objected by demurrer that the remedy was barred by lapse of time; and Mr. Chancellor Walworth, in affirming the decree of the Vice-Chancellor sustaining the demurrer, said: "It was formerly doubted whether a defendant in equity could, by demurrer, make the objection that the remedy was barred by lapse of time, or whether he must not resort to his plea. But it now seems to be settled that, if it appears upon the face of the bill that the suit is barred by lapse of time, the defendant may demur; and that, if the case is within any of the exceptions of the statute, the complainant must state the fact in his bill."

The plaintiff in the case at bar has not by any allegations of

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Nagle v. Macy.

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the complaint brought himself within the exception of the statute, and the demurrer was therefore well taken.

Judgment affirmed.

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## NAGLE v. MACY.

It is the settled doctrine of the law, repeatedly affirmed by this Court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment.

In this State, a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for the debt, and default in the payment does not change its character.

Possession by the mortgagee cannot abridge, enlarge, or otherwise affect his interest, nor convert that which was previously a security into a seizin of the freehold.

If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of debtor and creditor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession.

The character of a mortgage, as security, is in no way affected by the fact that judgment for the debt has been obtained.

The debt and mortgage are inseparable. The latter must follow the former. As distinct from the debt, the mortgage has no determinate value, and is not a subject of transfer.

Where the mortgagor dies after decree of foreclosure entered, and no administration is had upon his estate, *it seems* that there is no reason why the execution of the decree should be stayed. The suit is in the nature of a proceeding *in rem*. The decree binds the specific property, and the case is within the reason of the proviso in section one hundred and forty-one of the Act Concerning the Estates of Deceased Persons.

The title of a purchaser under a sale on a decree of foreclosure, cannot be impeached in a collateral action, for irregularity in the proceedings on the sale.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This is an action of ejectment, to recover a lot situated in the city of San Francisco. It appears, from the record, that Thaddeus M. Leavenworth occupied the premises from some time in 1849 until March, 1850, when he conveyed them to Mitchell. In September, of the same year, Mitchell conveyed them to Wright, who, in November following, conveyed them to Evans. On the receipt of his conveyance, Evans executed a mortgage to Leavenworth, as security for the payment of \$923, and interest, within ninety days, and took possession of the premises, and occupied them from that time until March, 1851, when, not having paid any portion of the principal or interest upon the mortgage, he surrendered the possession to Leavenworth.

In May, 1851, Leavenworth commenced a suit in the District Court of San Francisco county, to foreclose the mortgage, and, upon the confession of Evans, judgment was entered for the amount due, and for the sale of the mortgaged premises. Evans died in March, 1852, and after his death, a certified copy of the

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decree was delivered to the Sheriff, and a sale of the premises was had, at which Leavenworth became the purchaser, and received a sheriff's deed. There is no proof of any administration upon the estate of Evans, or of any order of the Probate Court, authorizing the sale.

From the surrender of Evans, in 1851, until 1855, Leavenworth was in possession of the premises, by himself, or by tenants under him. In March, 1857, he conveyed to the plaintiff.

In the Spring of 1855, Wm. C. Leavenworth, a brother of Thaddeus, entered upon the premises, they being vacant at the time, and three or four weeks afterwards gave a quit-claim-deed to Whitney, who went into possession, and remained until February, 1856, when he conveyed to the defendant, who has been in possession ever since.

The case was, by consent, referred to a referee, upon whose report judgment was entered for the plaintiff, and a motion for a new trial having been denied, the defendant appealed; and for a reversal, contended, *first*, that no title was shown in the plaintiff, or in Leavenworth, through whom the plaintiff claimed, sufficient to support the action; and, *second*, that the Court erred in refusing a new trial.

*G. P. Fobes* for Appellant,

Cited *Bird v. Lisbros*, (9 Cal.,) and section one hundred and forty-one of the Act Regulating the Settlement of the Estates of Deceased Persons.

*John Satterlee* for Respondent.

As the law formerly stood, the mortgagee held the legal title, and was entitled to the possession, even as against the mortgagor. But, by the statutes of California, the mortgagee has not the right of possession as against the mortgagor.

But, after the debt becomes due and payable, the mortgagee may take and retain such possession, until the debt is paid. *Warring v. Smith*, 2 Barb. Ch. R., 119, 135.

While in possession, the mortgagee may exercise the right of owner. 4 Kent's Com., 161 or 165.

FIELD, J., after stating the facts, delivered the opinion of the Court—BURNETT, J., concurring.

It is the settled doctrine of the law, repeatedly affirmed by this Court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment. (*Hutchinson v. Perley*, 4 Cal., 33; *Winans v. Christy*, ib., 70; *Plume v. Seeward*, ib., 94.) This doctrine is not denied by the appellant, but the point of his objection is that the title of which the prior possession is evidence, passed from Leavenworth by his conveyance to Mitchell, and

the subsequent possession of Leavenworth from Evans was that of mortgagee; that, as mortgagee, his conveyance to the plaintiff, executed over two years after leaving the premises, passed no title or right of possession; and that the sale and deed, under the decree of foreclosure, having been made subsequent to Evans' death, are void.

In this State, a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for a debt, and default in the payment does not change its character. Neither can possession under the mortgage affect the nature of the mortgagee's interest, though by the language of the decisions it would seem otherwise. It can neither abridge or enlarge that interest, or convert what was previously a security into a seizin of the freehold. If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession. In this State, the owner of a mortgage can not become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance. (See *McMillan v. Richards*, decided at the present term.)

It follows that Thaddeus Leavenworth, as mortgagee, had only a chattel interest, and that the title to the premises was still in Evans, the mortgagor. The character of the mortgage, as security, was in no way affected by the fact that judgment for the debt had been recovered. The judgment was not assigned with land, and the transfer of the latter without the former could not be available for any purpose. The debt and the mortgage are inseparable. The latter must follow the former. As distinct from the debt, the mortgage has no determinate value, and is not a subject of transfer. In *Jackson v. Bronson*, (19 John., 325,) the mortgagor sustained ejectment against the grantee of the mortgagee, the Court holding the assignment of the interest of the mortgagee in the land, without an assignment of the debt, a nullity.

In *Ellison v. Daniels*, (11 New Hamp., 274,) the demandant was mortgagor, and the tenant claimed under the mortgagee, through various mesne conveyances; and it was held that nothing passed to the tenant. By the decisions in New Hampshire, the interest of a mortgagee is treated, so far as may be necessary for his protection, as real estate; but the Court say, in the case cited, that to enable the mortgagee to sell and convey the estate, is not one of the purposes for which his interest is to be thus treated; that there is no necessity that it should be so treated, as the sale can be equally well effected by the

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transfer of the debt secured by the mortgage. (*Bell v. Morse*, 6 N. H., 205.)

In *Peters v. Jamestown Bridge Company*, (5 Cal., 336,) the mortgagee, Perry, had conveyed the property to one person, and assigned the mortgage to another, and this Court held that the plaintiff who claimed under the mortgagee could not enjoin a sale of the premises upon a decree recovered by the assignee. "The deed from Perry to plaintiff could not operate," said Heydenfeldt, J., "as an assignment of the mortgage. The latter is a mere security for the debt, and cannot pass without a transfer of the debt; so it would seem that the two transactions are totally different in character; the intent of the one is to convey the title to the land, of the other to transfer a debt with its security."

In considering the rights of Leavenworth, as mortgagee, we have only carried the equitable doctrine respecting mortgages to its legitimate result. The provisions of section two hundred and sixty of the Practice Act have no application, as the mortgage was executed previous to their adoption.

The next question for consideration relates to the validity of the sale under the decree of foreclosure. It is insisted that the sale is void, because made after the death of the mortgagor. The decree is not set forth in the record, but it is presumed to be in the regular form—directing a sale of the premises, and application of the proceeds to the payment of the debt, a deposit in Court of any surplus, and execution for any deficiency. The Court had jurisdiction of the subject and the parties. The mortgage was a specific lien on the premises, and the decree directs their sale for its satisfaction.

It does not appear that any administration has been had on the estate of the deceased, nor that the deceased has any heirs in this State. It is difficult to perceive any valid grounds why the execution of the decree, in the enforcement of the lien, should be stayed under these circumstances. The suit to foreclose a mortgage is in the nature of a proceeding *in rem*. (16 Ohio, 141.) The decree binds the specific property, and the case is within the reason of the proviso in the one hundred and forty-first section of the Act Relating to the Estates of Deceased Persons, (Compiled Laws, 396;) and we do not think it was necessary to revive the decree by a bill, or by a proceeding in the nature of a *scire facias*. (Mitford's Ch. Plead., 69.) But, admitting the sale was irregularly made without a revival of the decree, it is not void but only voidable. It is good until regularly set aside, and the title of the purchaser under it cannot be impeached in this collateral action for any irregularity in the proceedings. (*Jackson v. Bartlett*, 8 Johns., 361; *Jackson v. Robins*, 16 Johns., 576.)

The motion for a new trial was properly overruled. The alle-

gation of the discovery of a deed of the premises from Thaddaus Leavenworth to William Leavenworth, made in the affidavit of the plaintiff, upon which the motion was based, was fully answered by the counter-affidavit of Thaddaus Leavenworth, that he never executed any such deed.

Judgment affirmed.

### BAGLEY v. ADMINISTRATORS OF McMICKLE, EATON, *et al.*

It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made, by the owner, or with his assent, the admissibility of the evidence will depend upon the cause, or motive of the party in effecting or assenting to the destruction.

The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat.

When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases.

The facts and circumstances of the destruction must be shown, in the first instance, to the Court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. The same principle which allows the parties to prove by their own testimony the destruction, must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence.

The naked fact of voluntary destruction, without explanation, is held such presumptive evidence of fraudulent design as to preclude all secondary evidence.

The preliminary proof is addressed to the Court, and of its sufficiency the Court is the sole judge.

The secondary evidence being admitted, it becomes the province of the jury to judge of its credit and weight. It takes the place of the primary evidence, the absence of which has been explained to the satisfaction of the Court, and is entitled to the same consideration.

The terms "has executed unto," when applied to instruments of writing, import both making and delivery.

*Per Burnett, J.*—*Quare*: Whether affidavits are admissible to prove the destruction of notes, when the plaintiff, and his witness and co-payee can be examined in open Court.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This action was commenced on the fourth of April, 1855, by the

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appellant, against the respondents, on three promissory notes made and delivered by G. C. McMickle, deceased, to Bagley and Sinton, and by them assigned to Bagley. On the death of McMickle, the claim, duly verified, was presented to the administrators of his estate, and rejected, and suit brought within three months thereafter.

The answer contains five different defences:

1. A general denial.
2. The Statute of Limitations of four years.
3. Payment and satisfaction.

4. That on May 1st, 1850, Bagley and Sinton agreed with the intestate to sell him a lot in San Francisco for \$14,000, on which he paid them, up to the 22d March, 1851, \$8,400, on which day the parties settled and entered into an agreement, in writing, setting forth the notes sued on, as the balance of the purchase-money due, but that the liability of McMickle was limited, and that it was provided that if the notes were not paid the intestate was not to be holden, but the lot to become forfeited to Bagley and Sinton, and they were to accept it in full discharge of the notes; that the notes were not paid, and that Bagley and Sinton did accept the lot, and sold it to other persons, and so discharged the notes.

5. That the notes were without consideration, and void.

Note—as to the second plea—the action was commenced fourth April, 1855.

The fourth plea is, the defendants' legal construction of the instrument hereafter shown in the evidence, and determined to be an erroneous construction by the Supreme Court.

The case has been tried three times in the Fourth District Court—the last time at the August Term, 1857, before the Court and jury.

On the trial, the plaintiff's counsel read to the Court, for the purpose of laying the foundation for the introduction of secondary evidence of the notes sued on to the jury, the following affidavits, viz.:

“ David T. Bagley, the plaintiff in the above entitled suit, being duly sworn, says: On the twenty-second day of March, A. D. 1851, Grove C. McMickle made and delivered to the firm of Bagley & Sinton three promissory notes of that date, described and referred to in a certain instrument in writing of that date, signed by this plaintiff, and R. H. Sinton and Grove C. McMickle, and acknowledged before J. P. Haven, notary public; that said notes remained in the possession of said Bagley & Sinton for some time after their maturity, and that, in the demand for the same, said Bagley & Sinton had been very lenient and indulgent to said McMickle, and had resorted to no legal proceedings to collect the same; and that said McMickle, having repeatedly requested said

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firm not to sell or negotiate said notes, and fearing a negotiation to some person who might be more vigorous in the collection of the same, the parties altogether, viz., said Bagley, Sinton and McMickle, consented and agreed that said notes, for the sole purpose of preventing their negotiation into the hands of some other party, or of their getting into the market, might be destroyed, and believing, also, that the rights of the parties would remain the same as before the destruction; and the said notes were then and there, to wit., about the fifteenth day of August, A. D. 1852, torn up into small pieces and thrown away, in the presence of all the parties. That said destruction was done for the purpose aforesaid, and by the agreement of the parties was not to affect the right of the said Bagley & Sinton to recover on said notes, and with full intent on the part of all the parties, that the rights of the parties should be as if the notes continued to exist."

"Richard H. Sinton, being duly sworn, deposes and says: That on the twenty-second day of March, A. D. 1851, Grove C. McMickle made and delivered to the firm of Bagley & Sinton (then composed of the plaintiff and this affiant,) three promissory notes of that date, being the same referred to and described in a certain instrument of writing of that date, executed in duplicate by said Bagley and said McMickle, and this affiant, under their respective hands and seals, and acknowledged by them respectively before J. P. Haven, a notary public, on the same day. That said notes remained in the possession of said Bagley & Sinton for some time after their maturity, and that in the demand for the same said Bagley & Sinton had been very lenient and indulgent to said McMickle, and had resorted to no legal proceedings to collect the same, and that the said McMickle repeatedly urged said firm not to sell or negotiate the said notes, as he feared a negotiation to some person who might be more rigorous in the collection, and believing he had a claim for indulgence on said firm, and having a great objection to his paper being hawked about in the market—the parties altogether, to satisfy said McMickle, and to prevent a negotiation of said notes into the hands of some other parties, or their getting into the market, consented that the same might be torn up or destroyed, and, according to the best recollection and belief of this affiant, the same were torn up into small pieces, about the fifteenth day of August, A. D. 1852, and thrown away, in the presence and by consent of said Bagley & Sinton and said McMickle, but with the distinct understanding on the part of all, that the claim of said Bagley & Sinton on said notes against said McMickle should remain exactly as if said notes still existed, and that said Bagley & Sinton consented to the same only to satisfy said McMickle, as aforesaid, and with a full belief on their part that their claim on said notes was not affected thereby, and that the evidence of same, con-

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tained in said instrument, of the date of twenty-second March, 1851, would fully prove the same, and be all that would be necessary to enforce their collection."

The plaintiff's counsel then offered in evidence to the jury, the following instrument in writing, to wit :

"Know all men by these presents: That we, David T. Bagley and R. H. Sinton, composing the firm of Bagley & Sinton, of San Francisco, are held and firmly bound unto G. C. McMickle, also of San Francisco, in the sum of twelve thousand dollars, lawful money of the United States of America, to be paid to the said McMickle, his heirs, executors, or assigns; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and assigns, firmly by these presents. Sealed with our seals and dated this twenty-second day of March, A. D. eighteen hundred and fifty-one.

"Whereas, the said Bagley & Sinton, on or about the first day of May, A. D. 1850, did sell unto the said McMickle, for the sum of fourteen thousand dollars, a certain lot of ground in the city of San Francisco, situated on the northeast corner of Pacific and Kearny streets, the same measuring twelve and one-half varas on Pacific and thirty varas on Kearny street. Whereas, the said McMickle has paid at different times, of the above fourteen thousand dollars, the sum of eight thousand four hundred and twenty dollars, leaving a balance still due Bagley & Sinton, of five thousand five hundred and eighty dollars, which, together with one thousand dollars interest accrued, makes an aggregate due Bagley & Sinton this day of six thousand five hundred and eighty dollars. Whereas, the said McMickle has executed unto the said Bagley & Sinton three promissory notes, of even date with these presents, amounting, in the aggregate, to the last written sum—one of said notes being for the sum of two thousand dollars, payable thirty days after date—another for a like sum of two thousand dollars, payable sixty days after date, and the third and last for the sum of two thousand five hundred and eighty dollars, payable ninety days after date—each and all bearing interest at the rate of five per centum per month from date :

"Now the condition of this obligation is such, that if the said McMickle shall well and truly pay to the said Bagley & Sinton, or their assigns, the said notes, at maturity, then the said Bagley & Sinton agree and hereby bind themselves to execute to the said McMickle a quit-claim-deed of all their right, title, and interest, in and to the aforementioned lot of ground. But if the said McMickle shall make default in the payment of any one or all of the said notes, then the said McMickle is to forfeit all right or interest in the said lot of ground; and the said Bagley &

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Sinton are hereby authorized to make such disposition thereof, discharged of all claim, or pretence of claim or interest in the same, on the part of the said McMickle, as they may see fit.

"In witness of all of which, the said David T. Bagley and R. H. Sinton for themselves, and the said G. C. McMickle for himself, have signed and sealed these presents in duplicate, at the city of San Francisco, this, twenty-second day of March, A. D. eighteen hundred and fifty-one.

"Attest:

"DAVID T. BAGLEY, [L. S.]

"R. H. SINTON, [L. S.]

"G. C. McMICKLE, [L. S.]

"NOTE.—In fourth line from bottom, first page, the words 'payable ninety days after date,' are interlined and noted before signing.

"G. W. BAKER,

"DANIEL J. THOMAS, JR."

"STATE OF CALIFORNIA,  
"County and City of San Francisco. } ss.

"On this 22d day of March, A. D. 1851, personally appeared before me, a notary public, duly admitted and sworn, David T. Bagley, R. H. Sinton, and G. C. McMickle, known to me to be the persons described in and who executed the foregoing instrument of writing, who acknowledged that they executed the same freely, and of their own accord, for the purposes therein set forth.

[L. S.]

"J. P. HAVEN, N. P."

It was then and there admitted, by the defendants' counsel in open Court, in the presence of the Court and jury, that the signatures to the foregoing instrument were genuine, and that the same was executed in duplicate, one part of which was then in the possession of the plaintiff, and one of the defendants, as the representatives of the intestate.

To the admission of this instrument in evidence to the jury, the defendants' counsel objected, but the Court overruled the objection, and permitted it to be read in evidence to the jury, which was done.

The assignment to the plaintiff was duly proven, and also the presentation of the sworn claim to the administrator, its rejection, and the bringing of the suit within three months thereafter.

It was also admitted by defendants' counsel, in presence of the Court and jury, that the defendants had made due publication as such administrators, calling in all claims against their intestate, within ten months after date of said publication, which time had expired; and that this claim had been presented within said ten months, by said Bagley and Sinton.

The defendants offered no evidence. The Court instructed the jury, without being requested by either party, as follows:

"The bond is sufficient evidence of the making of the notes

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therein described. The affidavits of plaintiff and Sinton are addressed to the Court for the purpose of accounting for the non-production of the notes sued upon, and laying the foundation for secondary evidence, and are not evidence for the jury. These affidavits show that the maker of the notes peaceably acquired their possession, and destroyed them with plaintiff's consent. Under these circumstances, I feel it my duty to instruct you that there is no testimony to show there is any amount due upon the notes sued upon. This is the third trial of this case, but it is the first time that it has come up in this form; heretofore Sinton was introduced by plaintiffs as a witness, and explained the delivering of the notes to the maker.

"I can only regard the affidavits as in evidence to satisfy the Court the notes can not be produced upon this trial, and to authorize secondary proof of their contents; but as they trace the notes to the possession of the maker, and disclose that they were destroyed by him with plaintiff's consent, it raises no presumption that they were unpaid in whole or in part; but on the contrary, regarding the affidavits only as proving the destruction in the manner disclosed—by the maker, with the consent of the owners—it raises a presumption in favor of the former, which plaintiff is bound to explain by additional evidence. The affidavits themselves contain an explanation, but in this respect they go beyond their true purpose. Defendants had no opportunity to cross-examine the affiants, and this Court can not give any greater force and effect to the affidavits, than was asked for them when they were introduced, and there is no proof to rebut the presumption in favor of the deceased maker of the notes.

"If plaintiff can and should recover upon the testimony as it now stands, then any person who pays a note, takes it up and destroys it, may be compelled to pay it a second time if he is not prepared to defend by proof of actual payment. Merely taking up his note and destroying it would be no protection if the then holder could, as the plaintiff here has attempted to do, compel him afterwards, by bringing suit and making affidavit as in this case, to show an actual payment. To establish such a principle of law, would not only be dangerous, but also be taking away what has been regarded the best and most ordinary protection and safeguard that a party has when he makes payment of obligations of this kind. There is no evidence to warrant a general verdict for the plaintiff for any amount of money due plaintiff."

The jury found in favor of defendants under these instructions.

Plaintiff moved the Court for a new trial, which motion was denied. Plaintiff appealed to this Court, and assigned as error the instruction of the Court.

*Hoge & Wilson* for Appellant.

1. The foundation for the introduction of secondary evidence may be made either by the party's own affidavit, or that of another person. *McCann v. Beach*, 2 Cal., 25, 29, 30, 31; *Tayloe v. Riggs*, 1 Peters' S. C. R., 596; *Jackson v. Freer*, 16 Johns., 193; *Harris v. Doe*, etc., 4 Blackf., 376; *Dormady v. State Bank Illinois*, 2 Scam., 244; *Adams et al. v. Leland et al.*, 7 Pick., 62; 1 Greenl. Ev., § 558.

The Judge of the Fourth District Court held that the affidavits were admissible to lay the foundation for secondary evidence. See, also, *Wells v. Martin*, 1 Ohio, 389; 20 Johns., 145.

2. All the facts about the loss and the circumstances, motives, and objects of the destruction may be shown in affidavits. Written instruments are most generally kept by the parties themselves, and, in most cases, it would be impossible to prove the destruction and its circumstances by disinterested witnesses. To require such proof would be, in most cases, a denial of justice. See *McCann v. Beach*, 2 Cal., 30.

"Parties and persons interested are recognized as competent witnesses in respect to the facts and circumstances necessary to lay a foundation for secondary evidence." 4 Phillips on Ev., being second part Cowen and Hill's Notes, 408; 3 ib., 50, and cases cited.

In *Riggs v. Tayloe*, 9 Wheat., 483, the circumstances of the destruction were detailed in the plaintiff's affidavit, and, among other things, it stated, "The plaintiff in this cause makes oath in relation to the memorandum of agreement between the defendant and himself relative to the stock in the declaration mentioned, that his impression is that he tore up the same after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper."

In *Page et al. v. Page*, 15 Pick., 368, a great many facts and circumstances are narrated in an affidavit of one of the plaintiffs, tending to show a loss.

So, also, in *Livingston v. Rogers*, 1 Ca. Cases, 28, and *Jackson ex dem. Livingston v. Neely et al.*, 10 Johns., 374, and in *Dumas v. Powell*, 3 Dev., 103.

The very loss or destruction may be shown by the circumstances themselves, or inferred from facts stated. 4 Cow. & Hill's notes to Phil. on Ev., pt. 2, notes, p. 405, and cases cited; *Taunton Bank v. Richardson*, 5 Pick., 441; *Patterson v. Winn et al.*, 5 Peters, 242.

"Believing the paper in question has been destroyed, has been deemed sufficient to let in secondary evidence." *Riggs v. Tayloe*, 9 Wheat., 483; 7 East, 66; 8 East, 284.

To hold that the party may show by his affidavit merely the destruction, but not the circumstances and facts to explain how

or wherefore destroyed, is to make a benign rule, and then so restrict it as to deprive it of all good.

In *Blade v. Noland*, 12 Wend., 173, the destruction was held fatal to a recovery, because the mere naked fact of destruction appeared. The Court said: "The proof is that the plaintiff deliberately and voluntarily destroyed the note before it fell due, and there is nothing in the case accounting for or affording any explanation of the act, consistent with an honest or justifiable purpose."

Again, in reviewing the cases, he says, p. 175: "Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of a fraudulent design." 2 Johns. Cas., 488; 3 Ca., 363; and other cases there cited.

In *Riggs v. Tayloe*, 9 Wheat., 483, the very circumstances under which the destruction was shown to have been made, by the plaintiff's own affidavit, enabled the plaintiff to give the secondary evidence.

In *Adams et al. v. Leland*, 7 Pick., 62, the preliminary proof to the Judge of the destruction of the documents about which the secondary evidence was offered, was made by one of the plaintiffs, and was not limited to the mere fact of destruction, but showed the circumstances under which it occurred, viz.: that it was "accidentally destroyed by fire."

In *Taunton Bk. v. Richardson*, 5 Pick., 436, the circumstances of the supposed destruction were set forth.

If the plaintiff's affidavit may be introduced, and is competent to lay the foundation for the introduction of secondary evidence, and if the circumstances of the destruction are an essential part of the preliminary proof of the Court, by what system of reasoning do we reach the conclusion that the plaintiff can show in his affidavits only the mere fact of destruction, and not also the circumstances under which destroyed? If the preliminary evidence is to the Court, and may be made by the plaintiff, or any one else, in affidavits, to say that everything that is requisite to lay the foundation for the secondary evidence, cannot be shown in the affidavits, is a simple contradiction of terms. It is laying down admitted premises, and deducing a conclusion which only consists of a denial of the premises.

3. The preliminary proof, to lay the foundation for the introduction of secondary evidence, is addressed solely to the Court. The Court must first pass upon this question, before the secondary evidence can be admitted to the jury.

This has been somewhat referred to above. In 1 Greenl. Ev., § 558, it is said: "And the question, whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the Court, and not by the jury."

The same point is maintained in *Page v. Page*, 15 Pick., 368; *Poignaud v. Smith*, 8 Pick., 278; *Riggs v. Tayloe*, 9 Wheat., 483; 5 Cond. U. S. R., 647; 4 Cow. & Hill's notes to Phil. on Ev., 408; 3 Ibid., p. 60, note 50; *Tayloe v. Riggs*, 1 Peters, 597; *Donelson v. Taylor*, 8 Pick., 389-90; *Jackson v. Freer*, 16 John., 195.

Many of the other cases herein recited sustain the same point. The Court held the same thing in its instructions to the jury.

4. The District Court, after receiving the preliminary proofs, to lay the foundation for the introduction of secondary evidence, admitted the secondary evidence to go to the jury, though objected to by defendant's counsel.

The District Court admitted the same secondary evidence upon all the former trials.

Had the Court sustained the objection of defendants' counsel to the introduction of secondary evidence of the notes, because not satisfied, the plaintiff would have offered further preliminary proof. That he had other proof, is apparent from the former trials.

5. After the secondary evidence went to the jury, it was solely for the jury to determine the issues of fact on the evidence introduced before them.

"We think very clearly that the question whether secondary evidence should have been allowed or not, was for the Court and not for the jury to determine. The jury might as well be called upon to decide upon the competency of any other evidence as upon this. The Court must decide what is and what is not competent evidence to be laid before the jury. The rule is just as clear as is the rule that after the evidence is submitted, the jury are to be the judge of the credit and weight of it." *Page v. Page*, 15 Pick., 374.

"That a particular deed existed is a most material inquiry; the fact of its existence and the contents of the deed, are matters to be tried by the jury. The loss of it must be made out as a prerequisite to the satisfaction of the Court." *Jackson v. Freer*, 16 Johns. R., 193, 196.

See, also, *Bean v. Keen*, 7 Blackf., 152; *Riggs v. Tayloe*, 9 Wheat., 483.

In *Tayloe v. Riggs*, 1 Peters, 597-8, the same point was decided. The Court there say: "Secondary evidence having been properly admitted, and the transfer of the stock and payment of the purchase-money proved, the next inquiry is into its competency to establish the contract stated in the declaration."

6. The instructions of the Court to the jury were directly inconsistent with the prior decision admitting secondary evidence of the notes sued on; were erroneous, so far as the law was applied to the facts, and took the case entirely out of the hands of the jury.

This is manifest from the foregoing points and authorities.

The Court had no right to comment to the jury upon the preliminary proof which was addressed solely to the Court, except for one special purpose, and that was the very opposite of the purpose of the Court in this instance.

The case of *Page et al. v. Page*, 15 Pick., 368 to 375, was, like this, an action of *assumpsit* upon a promissory note. The affidavits of the plaintiffs were presented to the Court to show the loss of the note, and were ruled to be presumptive evidence of loss, and sufficient to let in evidence of its contents. The jury found a verdict for the plaintiffs under the instructions of the Court. On appeal to the Supreme Court, one ground contended for by appellant was "that the Judge who tried the cause ought not to have commented on the affidavit of Kelly Page, which had not been read to the jury in evidence, and stated that it furnished sufficient ground to rebut the presumption arising from the non-production of the note by the plaintiffs, that it had been paid to them, and without which there was no satisfactory evidence tending to prove that the note had not been paid to them after a period of five years."

When the Supreme Court came to speak of the comment of the Court below on the affidavit, they use this language: "The only commentary made on the affidavit was an explanation of the reason why the Court had admitted secondary evidence. It was entirely proper, as some of the jury, without such an explanation of the rule of law touching secondary evidence, might have hesitated to give a verdict upon a note which was not produced. The whole charge, it seems to us, was unexceptionable upon that point."

How different was the view of the District Judge from the Supreme Court of Massachusetts! He commented on the affidavits to tell the jury "that there was no testimony to show there was anything due upon the notes sued on," though he also says the affidavits were sufficient "to satisfy the Court that the notes could not be produced on that trial, and to authorize secondary proof of their contents."

The Court then tells the jury the contents of the affidavits, which were addressed solely to him, and about which it is expressly said in the charge that they "are not evidence for the jury," and then states to the jury that "it raises a presumption in favor of the former, (that is, McMickle, the maker of the notes,) which plaintiff is bound to explain by additional evidence;" and again, in another part of the charge, says: "And there is no proof to rebut the presumption in favor of the deceased maker of the note."

This "presumption," according to the charge, arises from the affidavits. The affidavits were not before the jury. How could the plaintiff be bound to rebut this presumption by "additional

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evidence," when neither the presumption nor the fact out of which it arose, was before the jury?

It could not be that the "additional evidence" was to be introduced to the Court, because he had already passed on all the evidence addressed solely to him, and had been satisfied, and had permitted the plaintiff to introduce his secondary evidence to the jury.

The "presumption" did not arise from the secondary evidence. It could not arise from the non-production of the notes sued on. The case of *Page et al. v. Page*, 15 Pick., pp. 374-5, is too good sense and too good authority for that.

With all due deference to the Court below, we must say this is a most palpable error of law.

The reasoning of the Supreme Court of New York, in *Jackson v. Betts*, 9 Cow., pp. 222-3, is so clear on this question, that we may be excused for extracting the following. The question there was on secondary evidence of a lost will, and on its effect when introduced:

"Let the question be examined on principle. The plaintiff is required to prove the will of the testator, and produce it, or show legal grounds for the dispensing with the production of the original. If the facts proved are such as the law sanctions, and excuse the production of the will, then the copy or contents of the will, proved, necessarily stand in the place of the original, and have the same legal effect. This principle is familiar in the case of all written instruments. If the original is lost or can not be found, you may resort to secondary evidence; and if that is sufficient, it supplies the place of the paper lost, or which can not be found. In these cases, was it ever urged as an objection, that after full proof of the contents, undisputed and unquestioned, a party was not entitled to all the benefits that would have arisen had the original been produced?"

That case was afterwards reversed in the Court of Errors, but not on any ground that affected this reasoning or these principles. It was reversed because the will was presumed, under the circumstances, to have been revoked; it therefore had no legal existence as a will, and, of course, there could be no secondary evidence of what never existed. *Jackson ex dem. Brown v. Betts*, 6 Wend., 173. But, as to the effect of secondary evidence of an instrument once shown to have existed, the principle and reasoning of 9 Cow., 223, are beyond contest. We ask the counsel for respondents, in the language of that case: "In these cases was it ever urged as an objection, that, after full proof of the contents, undisputed and unquestioned, a party was not entitled to all the benefits which would have arisen had the original been produced? We are not aware that any such objection has ever been sustained, or even raised," excepting always this case.

The conclusion of the charge of the District Court to the jury took the case entirely out of their hands. It left the jury nothing to do but to find a verdict for the defendants, yet the proof was most unquestionably before them of the former existence of the notes, of their contents, of their execution, by the intestate to the plaintiff and Sinton, and the assignment by Sinton to the plaintiff. No evidence was offered by defendant.

In the charge to the jury the District Court comments upon the great inconvenience of the doctrine we contend for. He says: "If a party can and should recover, upon the testimony as it now stands, then any person who pays a note, takes it up, and destroys it, may be compelled to pay it a second time, if he is not prepared to defend by proof of actual payment." This is a most remarkable thing to say to a jury. It is not instruction, it is mere argument. But let us examine it. How does the danger in this case differ from the danger in *Riggs v. Tayloe*, 9 Wheat., 483; *S. C.*, 1 Peters, 596; *Page v. Page*, 15 Pick., 368; or the cases cited in 4 Cow. and Hill's notes, to Phil. on Ev., pt. 2, notes, p. 405.

The danger apprehended, is to a man who pays his note and takes it up and destroys it, and has no proof of payment. Well, what is the danger? It is of course perjury, "which the law will not presume and can in no instance guard against," as Judge Washington says, in *Martin v. Bank of the United States*, 4 Wash. C. C. R., 256. "If," said he, "upon any other ground than fraud or perjury, the maker of the lost note may, by possibility be twice charged, the law will not expose him to that risk by relieving the owner of it, not because there may be imposition in the case, or the debt ought not to be paid, but because the proof that the claimant is the owner of the debt is defective," etc.

#### *Glassel & Leigh* for Respondents.

The question is whether, in an action upon a promissory note, under the general issue of a plea of payment, secondary proof of the execution and contents of the note is sufficient, *per se*, to sustain the action?

To determine this question, it is requisite to ascertain what proof is necessary to sustain an action upon a promissory note.

In Phillips on Evidence, 3 Lond. ed., vol. 2, p. 2, the law on this subject is thus stated:

"The plaintiff, in an action of *assumpsit* on a promissory note or bill of exchange, will have to prove, under the general issue:

"1. That the note or bill is either in express terms, or in its legal effect, the same as described in the declaration.

"2. That he has an interest in the note or bill, as payee, endorsee, or in some other character.

"3. That the defendant, as the pleadings allege, has become a party to the note or bill; and

"4. That the defendant has not performed his contract."

See, also, Chitty on Bills, 451; 2 Greenleaf on Evidence, § 155, et seq.

The mere production of the note, with proof of its genuineness, furnishes the necessary proof on all these points.

The contents of the note prove that the note is, either in express terms or in its legal effect, the same as described in the declaration.

The fact of the execution or endorsement of the note to the plaintiff, and his possession of it, proves, *prima facie*, his interest in it.

The defendant's signature to the note proves that he has become a party to the note as maker or endorser; and the fact that the note is outstanding, proves, *prima facie*, that the defendant has not performed his contract *i. e.*, has not paid the note. See Story on Promissory Notes, § 106; *Brembridge v. Osborne*, 1 Stark, 374; 2 Eng. C. L., 433.

On the other hand, what is proved by secondary evidence of the execution and contents of the note?

1. The contents of the note prove that it is, either in express terms or in its legal effect, the same as described in the declaration.

2. The fact of the execution or endorsement of the note to the plaintiff, proves his interest in it at the time of such execution or endorsement.

3. The fact of the execution or endorsement of the note by the defendant proves that he was a party to it at the time of such execution or endorsement; and,

4. The secondary evidence wholly fails to prove that the defendant has not performed his contract; *i. e.*, has not paid the note.

For aught the secondary evidence proves, the defendant may have paid the note, or may have been released from his liability upon it.

It is a self-evident absurdity, that proof of the making of a promise is, also, proof of a breach of promise; that proof that McMickle once promised to pay Bagley & Sinton a certain sum of money is, also, proof that he never did pay them that sum of money.

From what we have said, it is, we think, clear, that in an action upon a promissory note, under the general issue and a plea of payment, whilst the mere production of the note, with proof of its genuineness, is sufficient to sustain the action, secondary proof of the execution and contents of the note is not, *per se*, sufficient to sustain the action.

The counsel for the appellant contend, on the contrary, that

when admitted, secondary proof of the execution and contents of a promissory note, is, to all intents and purposes, equivalent to the production of the note itself, with proof of its genuineness.

In support of this proposition, see *Jackson ex dem. Brown v. Betts*, 9 Cow., 222-3.

Secondary proof of the execution and contents of a deed or will, when properly admitted, is equivalent to the production of the deed or will itself, with proof of its genuineness.

But such is not the law in the case of all written instruments.

It is not the law in the case of a promissory note.

And this difference is the necessary consequence of the difference between the nature of a deed, or a will, and that of a promissory note.

A deed or a will once in effect, continues in effect forever; and it is wholly immaterial into whose possession it may come.

A promissory note, on the contrary, is presumed by the law to be unpaid or paid, as it is or is not, outstanding.

In the one case the inquiry is whether the instrument was ever in effect; in the other, the inquiry is whether the instrument is now in effect.

In consequence, secondary proof of the execution and contents of a deed or will, proves all that the deed or will itself would prove if produced, with proof of its genuineness; whilst secondary proof of the execution and contents of a promissory note does not prove all that the note itself would prove, if produced, with proof of its genuineness, for it does not prove that the note is outstanding, which the production of the note would prove.

After all, perhaps, the reasoning quoted, rightly construed, is limited to the case of a deed or will. If so, we do not gainsay it. But, in that case, it has no bearing on the question under consideration.

The counsel for the appellant ask us, in the language of the quotation, "In these cases was it ever urged as an objection, that, after full proof of the contents, undisputed and unquestioned, a party was not entitled to all the benefits that would have arisen had the original been produced?"

The sole authority cited by the counsel for the appellant upon this point, is itself a case in which the objection was not only urged but sustained.

The case of *Page et al., Executors, v. Page*, 15 Pick., 368, was an action of *assumpsit* by executors upon a promissory note alleged to be payable by the defendant to their testator.

At the trial, before Shaw, C. J., the note was not produced.

Upon the affidavit of both of the plaintiffs to the effect that the note had never been in their possession, and the affidavit of one of the plaintiffs to the effect that, after due search, the note

could not be found, the Court permitted secondary evidence of the note to be introduced.

The decision in this case involves, we think, these propositions:

1. The non-production of a promissory note by the party claiming under it, raises a presumption that it has been paid.

2. The affidavit of a plaintiff, that after due search the note can not be found, is sufficient preliminary proof to the Court to let in secondary evidence to the jury of its existence and contents.

3. Upon the evidence before them concerning the note, the jury are to determine whether the presumption of payment arising from the non-production of the note is rebutted by that evidence.

That the decision involves the first and second of these propositions will not, we presume, be questioned. That it involves the third, also, is to our minds equally clear.

The evidence introduced before the jury by the plaintiffs tended to prove not only the execution and contents of the note, but that it had not been paid.

After the introduction of this evidence, one of the grounds of the defence before the jury was, that the note had been paid; and the defendant offered no evidence upon this point, relying upon the presumption of payment arising before the jury from the non-production of the note.

The jury were instructed that if they should believe, upon the evidence before them, that the note had not been paid, that evidence would be sufficient to rebut the presumption of payment arising before them from the non-production of the note.

One of the grounds on which the defendant moved for a new trial was, that the Judge who tried the cause commented on the affidavit of one of the plaintiffs, which had not been read in evidence, and stated to the jury that it furnished sufficient evidence to rebut the presumption of payment arising from the non-production of the note.

In fact, the Judge did not state to the jury that the affidavit furnished any evidence whatever to rebut the presumption of payment arising from the non-production of the note; he merely said that the affidavit was sufficient to let in secondary evidence of the existence and contents of the note. This comment upon the affidavit was only an explanation of the reason why the secondary evidence was admitted.

The confessions of the defendant that he had the possession of the note after the death of the testator, that it was due, and that he was ready to pay it, together with the evidence which the defendant produced to contradict those confessions, were

submitted to the jury to determine upon the defence of payment set up by the defendant.

These circumstances leave not the least doubt that the decision involves the third proposition.

In this case, therefore, after full proof of the execution and contents of the note, undisputed and unquestioned, it was urged as an objection that the party was not entitled to all the benefits that would have arisen had the original been produced, and the objection was sustained by the instruction to the jury, that such proof of the execution and contents of the note was not sufficient to entitle the plaintiff to recover without additional evidence before them to rebut the presumption arising from the non-production of the note.

And it is, consequently, a direct authority that in an action upon a promissory note, under the general issue, and a plea of payment, secondary proof of the execution and contents of the note is not, *per se*, sufficient to sustain the action.

The case of *Bailey v. Gould*, Walk. Mich., 478, was a suit in equity to foreclose a mortgage. The bill set up a note, and a mortgage to secure its payment. The answer, in effect, denied the making of the note and mortgage, and called for proof of those facts among others. A replication was filed; and testimony was taken by both parties. On the hearing, upon the pleadings and proofs, Manning, J., said, on this point:

"The promissory note is not in evidence, and, for aught that appears in the testimony, it may have been paid. The law does not raise a presumption of non-payment, but of payment when due, unless the contrary is shown by the production of the note, or other evidence repelling the presumption, when the note itself cannot be produced."

We have thus, we think, established the correctness of the instruction that the evidence was not sufficient to support a verdict in favor of the plaintiff for any sum, and, consequently, that there was no material error in the charge of the Court to the jury. No error in any other proceeding in the case is assigned by the plaintiff. We respectfully insist, therefore, that the judgment must be affirmed.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This is an action upon three promissory notes executed by McMickle, deceased, to Bagley and Sinton, and by them transferred to the plaintiff. At the solicitation of the maker, the notes were delivered to him in August, 1852, by the holders, and in their presence and with their consent were then destroyed. On the trial, the plaintiff, in order to account for the non-production of the notes, and to lay the foundation for the introduction of secondary evidence of their contents, read to the Court his own

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and his co-payee's affidavits, detailing the circumstances and motives which occasioned the destruction of the notes. These affidavits were held by the Court sufficient to authorize the admission of the secondary evidence, and thereupon the plaintiff gave in evidence and read to the jury a bond or contract, executed in duplicate by all the parties simultaneously with the notes, the maker of the notes retaining one part, and Bagley and Sinton the other. This bond sets forth with sufficient particularity the contents of the notes; it gives their date, amount, and consideration, the parties to whom they were executed, the time they had to run, and the interest they drew. The transfer of the notes to the plaintiff, the presentation of his claim arising thereon to the administrators, its rejection by them, and the commencement of this suit within three months thereafter, were duly proved. With the above, and the admission of the appointment of the defendants as administrators, and that the presentation of the plaintiff's claim was made to them within ten months after their publication of notice calling in claims against the estate of the deceased, the plaintiff rested his case. No evidence was offered on the part of the defendants. The Court thereupon, among other things, instructed the jury that there was no testimony to show that any amount was due upon the notes, and that as the affidavits read to the Court to authorize the secondary evidence of their contents traced the notes to the possession of the maker, and disclosed that they were destroyed by him with plaintiff's consent, no presumption was raised that they were unpaid, in whole or part, but, on the contrary, a presumption was raised in favor of the maker, which the plaintiff was bound to explain by additional evidence; that the affidavits themselves contained an explanation, but in this respect went beyond their true purpose. The verdict and judgment were for the defendants, and a motion for a new trial having been denied, the plaintiff appealed, and assigns these instructions as error.

It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made, by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat. When it

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appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases.

In *Riggs v. Tayloe*, (9 Wheaton, 483,) the plaintiff brought suit upon a contract for the sale of bank stock, executed in duplicate between the parties, each retaining a counterpart. Having lost his own counterpart, the plaintiff gave notice to the defendant to produce on the trial the one he had, but the defendant declined doing so, alleging that he had lost his also. On the trial, the plaintiff offered to prove the contents of the contract by a subscribing witness, and to entitle him to give this testimony, made the following affidavit: "The plaintiff in this case makes oath, in relation to the memorandum of agreement between the defendant and himself, relative to the stock in the declaration mentioned, that his impression is that he tore up the same after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. He is not certain that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up it has become lost or mislaid; and that he has searched for it among his papers repeatedly and cannot find it." The defendant objected to the testimony, and insisted that no evidence of the contents of the contract should be allowed. The objection was sustained, and the defendant had judgment, and the case was taken to the Supreme Court of the United States, where it was held that the Circuit Court erred in refusing to let the evidence go to the jury, and the judgment was reversed. In rendering its decision the Supreme Court said: "It is further contended, that it appears from the plaintiff's own showing, the destruction or loss of the writing was voluntary, and by his own default; in which case he ought not to be permitted to prove its contents. It will be admitted that where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes; or to create an excuse for its non-production, in such cases the secondary evidence ought not to be received; but in cases where the destruction or loss (although voluntary) happens through mistake or accident, the party can not be charged with default. In this case the affiant swears that if he tore up the paper it was from a belief that the statements upon which the contracts had been made were correct,

and that he would have no further use for the paper. In this he was mistaken."

In *Blade v. Noland*, (12 Wendell, 174,) the plaintiff testified that he burnt up the note in suit, the morning after it was given. The destruction was deliberately made, and no explanation of the act was offered on the trial. The plaintiff had judgment in the Justice's Court, which was affirmed on *certiorari* in the Common Pleas, and the case was taken to the Supreme Court of New York, where the judgment was reversed. In rendering its decision, the Court said: "The proof is, that plaintiff deliberately and voluntarily destroyed the note before it fell due, and there is nothing in the case accounting for or affording any explanation of the act, consistent with an honest or justifiable purpose. Such explanation the plaintiff was bound to give affirmatively, for it would be in violation of all the principles upon which *inferior and secondary* evidence is tolerated, to allow a party the benefit of it who has willfully destroyed the higher and better testimony. I have examined all the cases decided in this Court, where this evidence has been admitted, and in all of them the original deed or writing was lost or destroyed by time, mistake, or accident; or was in the hands of the adverse party. Where there was evidence of the actual destruction of it, the act was shown to have taken place under circumstances that repelled all inference of a fraudulent design."

In the case of the *Bank of the United States v. Sill*, (5 Conn., 106,) the Court said: "When the holder of a bill voluntarily and intentionally destroys it, or alters it fraudulently, he has no remedy, but if he loses, cancels, alters, or destroys it, by accident or mistake, his rights are not affected; his evidence only is impaired. A bill or note is not a debt, it is only primary evidence of a debt; and when this is lost or destroyed, *bona fide*, it may be supplied by secondary evidence."

Authorities to the same effect might be cited almost *ad infinitum*. From them it is clear, that the cause or motive of the destruction of the instrument in suit, when voluntarily made, must determine the question of the admissibility of secondary evidence of its contents. From them it is also clear, that the facts and circumstances of the destruction must be shown in the first instance to the Court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. These facts and circumstances, in a great number of instances, probably the greater number, are known only to the parties themselves, and from them alone can any proof be obtained. The same principle, then, which allows the parties to prove by their own testimony the destruction, must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence. If the testimony of independent and disinterested witnesses were essential to prove these facts and

circumstances, there could never be any necessity for the testimony of the parties themselves to the destruction. The circumstances of the destruction could only be known in connection with the destruction itself, and the latter fact could be established with the former facts by the same witnesses. The naked fact of voluntary destruction without explanation, is held such presumptive evidence of fraudulent design, as to preclude all secondary evidence, (*Blade v. Noland*, 12 Wend., 173,) and the restriction placed upon the rule by the Court below, in this case would deprive it of all practical benefit in the numerous, and by far the largest class of cases, where the destruction has taken place when no third party was present. We do not think, therefore, that the affidavits read to the Court below, in explaining the possession and destruction of the notes in suit by the maker, went "beyond their true purpose." We do not find any adjudicated case directly upon the question; but in a great number of cases which we have examined, the facts and circumstances are set forth in the affidavits of the parties, and in some instances, with great particularity; and, so far from any objection being taken to them on this ground, the facts thus detailed are generally referred to as justifying the admission of the secondary evidence.

Thus, in *Riggs v. Tayloe*, cited above, the statement of the plaintiff, in his preliminary affidavit, of his motive in the destruction of the contract in suit, is referred to in the opinion of the Court as a sufficient explanation to remove the objection to the admission of the secondary evidence.

The preliminary proof is addressed to the Court, and of its sufficiency the Court is the sole judge. We do not find in the cases cited, nor have we been able to find any authority for the ruling that a presumption against the plaintiff, arising upon facts detailed in the preliminary affidavits, is to be explained by evidence to the jury; or for the observation of the Court below, in its opinion on the motion for a new trial, that "sometimes the facts and circumstances connected with the destruction have been submitted to the jury, to be passed upon by them in considering their verdict," unless such facts and circumstances were disclosed in the evidence offered to the jury *after* the question of the admissibility of secondary evidence had been disposed of by the Court.

In *Page, Executor, v. Page*, 15 Pick., 368, the preliminary affidavits only showed a diligent and an ineffectual search for the note in suit among the papers of the testator; it was the evidence before the jury which traced the note to the possession of the defendant, and upon the presumption of payment arising from that possession, the defendant rested as one of the grounds of his defence. Chief Justice Shaw, who tried the case, instructed the jury, "that ordinarily the non-production of a note by a

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party claiming under it raises a presumption of payment; and, therefore, to entitle the plaintiffs to recover, it was not sufficient to prove merely the execution and contents of the note, without some evidence of the loss of it; that here the affidavit of Kelly Page (one of the plaintiffs) stating that he had searched among the papers of the testator, and had not been able to find such a note, was such evidence of its loss as to let in secondary proof of its existence and contents; and that if the jury should be of opinion, upon the whole evidence, that it was not paid to the testator in his lifetime, but remained in the custody of the defendant at the time of the testator's decease, this would be sufficient to rebut the payment arising from the non-production of the note by the plaintiffs."

The plaintiff obtained a verdict, and the defendant moved for a new trial, assigning, as one of the grounds of his motion, this commentary, or rather reference to the preliminary affidavit; but the Supreme Court, in denying the motion, said: "The only commentary made upon the affidavit was an explanation of the reason why the Court admitted secondary evidence. It was entirely proper, as some of the jury, without such an explanation of the rule of the law touching secondary evidence, might have hesitated to give a verdict upon a note which was not produced. The whole charge, it seems to us, was unexceptionable upon that point."

We can not see anything in this case which gives the slightest support to the instructions in the case at bar. The reference to the preliminary affidavit was simply to remove from the minds of the jury any difficulty which might have arisen from the non-production of the note; and by the "whole evidence," upon which the jury were instructed to form their opinion of the payment of the note, was meant the whole evidence before them. The presumption of payment from the non-production of the note, arising upon evidence before the jury, was, of course, to be met and rebutted by evidence before them. But in the case at bar, no such presumption could arise, for there was no evidence before the jury of any possession of the notes in suit by the intestate after their execution to Bagley and Sinton. The presumption, if any, arose upon the preliminary evidence, upon which the jury could not pass. Arising in the mind of the Court, it should have been stated at the time, in order that the plaintiff might have introduced other evidence, if he possessed it. Such presumption was disposed of by the ruling on the sufficiency of the affidavits, and in admitting the secondary evidence.

In *Garlock v. Georbner*, (7 Wend., 199,) the plaintiff sued for the amount of a promissory note, alleged to be in the possession of the defendant, and to have been given upon the settlement of a slander suit. In addition to the note, the costs of the slander suit were to be paid by the defendant. The general issue was

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pleaded, accompanied with notice that the defendant would prove a voluntary delivery up of the note, by the plaintiff, to him. On the trial, the agreement to settle the slander suit, the execution and contents of the note, its delivery to the defendant, and the payment of the costs of the slander suit, were duly proved. The plaintiff then called upon the defendant to produce the note, and on his refusing to do so, offered to prove that, under an impression that the defendant was entitled to its possession, until the costs were adjusted and paid, he had given the note up to the defendant, to keep until such payment or settlement; that, after receiving it, the defendant promised to pay the costs, and the amount of the note when it became due, and had made a similar promise after the costs were paid. This evidence, upon objection, was rejected, and the plaintiff nonsuited, and the case went to the Supreme Court, where the judgment was reversed. Mr. Justice Nelson, in delivering the opinion of the Court, said, whether the note "was intended to be given up and relinquished by the plaintiff or not, when put in the defendant's possession, should have been submitted to the jury. If the note was put by the plaintiff into the possession of the defendant through misapprehension, or ignorance of his rights, or for safe-keeping merely, or for any other cause inconsistent with the intention of relinquishing his property in it, for aught appearing in the bill of exceptions, the plaintiff would be entitled to recover. The plaintiff should have been allowed, if he could, to explain the possession of the note by the defendant, as well to rebut the *prima facie* inference of extinguishment of it, as to account for its non-production on the trial."

In this case, there was no preliminary proof addressed to the Court; and the presumption of extinguishment of the note, from its possession by the defendant, of course, could only arise upon the evidence before the jury. This case, like all the others cited, furnishes no authority for the instructions in the case at bar.

The secondary evidence being admitted, it became the province of the jury to judge of its credit and weight. It took the place of the primary evidence, and was entitled to the same consideration. It was a substitute for the original notes, and if sufficiently full as to their contents, it placed the plaintiff in the same position in Court as though the secondary evidence had never been required. (*Jackson v. Betts*, 9 Cowen, 222.) The distinction between primary and secondary evidence, has reference to its quality; and not to its strength. Secondary evidence may be equally conclusive as primary. In the present case, the former existence of the notes, their contents, their execution by the intestate to Bagley and Sinton, and their assignment to the plaintiff, were fully established by the secondary evidence; yet

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the consideration of this evidence was taken from the jury by the instructions.

The objection that the bond in evidence does not prove the delivery of the notes in suit, to Bagley and Sinton, we do not think tenable. The instrument was intended for the protection of the intestate; it contains no promise on his part, but an obligation to him of \$12,000, for the fulfillment of its condition by Bagley and Sinton. It recites the entire agreement between the parties, and the amount "*due Bagley and Sinton*" on the day of its execution, and that the intestate "*has executed unto*" them the three promissory notes in suit; and specifies the deed to which he shall be entitled on their payment, and the consequences of default. The terms "*has executed unto*," when applied to instruments of writing, import both making and delivery. The recital of the fact, under seal, that the intestate "*has executed unto the said Bagley and Sinton*," in the past tense, the notes can have but one meaning, namely: that the intestate has made and delivered the notes to them.

The judgment of the Court below is reversed, and the cause remanded for a new trial.

BURNETT, J.—I concur in reversing the decision of the Court below. Conceding that the secondary evidence was properly admitted, the plaintiff was entitled to a verdict. But I express no opinion as to the question whether *affidavits* were admissible to prove the destruction of the notes, when the plaintiff and the witness could have been examined in open Court, and none as to whether the facts embodied in the affidavits proved the destruction of the notes by accident or mistake, so as to justify the admission of secondary evidence of their contents. Were we to decide these questions, under the existing state of the case, we might make a decision of questions immaterial, as the plaintiff may prove a different state of facts upon another trial. The learned counsel for plaintiff states, in his brief, that "had the Court sustained the objection of defendants' counsel to the introduction of secondary evidence of the notes, because not satisfied, the plaintiff would have offered further *preliminary proof*." These questions have never been decided by this Court, but our decisions have turned upon other grounds.

## THE SAN FRANCISCO GAS COMPANY v. THE CITY OF SAN FRANCISCO.

An answer is fatally defective if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief; the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice, and cannot have any legal effect.

The answer that the defendant, a municipal corporation, has "no knowledge or information" in respect to the allegations of a count in a verified complaint, "and therefore denies the same," is insufficient.

The statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in a verified complaint, to enable them to answer in the proper form.

The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons.

*Per Field, J.*—A municipal corporation, outside of its governmental capacity, is in many respects to be regarded the same as a private corporation, and its officers and agents through whom it acts, must be presumed to know the contracts it enters into, the purchases it makes, and the property it uses. The knowledge of such matters must rest with some of its officers, and the corporation can not shelter itself under an assertion of ignorance.

Under some circumstances a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It can not avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations.

A corporate act is not essential in all cases to fasten a liability, and if it were necessary the law would sometimes presume, in order to uphold fair dealing, and prevent gross injustice, the existence of such act, and estop the corporation from denying it.

Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied *assumpsit* arises against it.

It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them, without authority, have been ratified.

*Per Burnett, J.*—A specific denial to each allegation of a complaint is a separate denial, applicable only to the particular allegation controverted.

When the facts alleged in a verified complaint are presumptively within the knowledge of the defendant, the Code requires his denial to be *specific*, not general. The object of the provision is to call the attention of the defendant, and to confine each denial to one allegation at a time, and not permit him to deny all at once.

The object of the Code was to narrow the proofs upon the trial; and, to accomplish this end, the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation.

There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant, but this Court can make no distinction, because the Code makes none. It is a matter for the Legislature, and not for the Court.

APPEAL from the Superior Court of the City of San Francisco.

This was an action of *assumpsit*.

The complaint contains two counts: The first, to recover

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Gas Company v. San Francisco.

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twenty-six thousand dollars, or thereabouts, for gas furnished for lighting the streets of San Francisco, under a contract between the city and James Donahue & Co., which was assigned to the plaintiff. This contract was before the Supreme Court, and affirmed in the case of the San Francisco Gas Company v. The City, 6 Cal. R., 190. On this count no question is now made.

The second count is for gas furnished by plaintiff to defendant outside of the contract, for lighting the city-hall and fire-engine houses belonging to the city, from November 1, 1854, to June 1, 1856—amounting in the aggregate to eighteen thousand one hundred and eighty-eight dollars and ninety-eight cents. The complaint alleges that plaintiff, at request of defendant, furnished, during the said time, large quantities of gas for lighting the city-hall and fire-engine-houses belonging to defendant, and that defendant used and consumed the same for said purposes; that the same was furnished and consumed nightly between the dates aforesaid; that, in consideration of the premises, the defendant promised to pay the plaintiff the value of the gas so furnished and consumed, and that the value of the same is eighteen thousand one hundred and eighty-eight dollars and ninety-eight cents. Schedules are annexed, showing monthly bills for gas. The question before the Court is upon this count.

The complaint is duly verified by the oath of the President of the San Francisco Gas Company.

The only answer to the second count is in the following words, to wit:

“And this defendant, further answering, saith, that the defendant has no knowledge or information in relation to the allegations of the second count of the said complaint; and, therefore, denies the same.”

By consent of parties by their counsel, entered in open Court, the cause was referred to Gilbert A. Grant for trial, and afterwards duly tried before him as referee, both parties being present by their counsel. The referee reported in favor of the plaintiff, finding due under the contract set out in the first count the sum of \$26,686 34; and for gas furnished under the second count, for lighting the city-hall and the fire-engine-houses, the sum of \$18,188 98.

The facts found by the referee under this second count are sufficiently stated in the opinion of Mr. Justice Field.

In addition to the facts found from the evidence introduced, the referee found as follows:

“In addition to the foregoing facts found from the testimony introduced, I also find, that the allegations contained in the second count of the complaint are not sufficiently controverted in the answer; and the allegations of the second count, for the purposes of the action, must be taken as true under the forty-sixth and sixty-fifth sections of the Practice Act.”

As a conclusion of law upon the facts, the referee found that the plaintiff was entitled to recover the sum of \$44,875 32.

The report having been filed, judgment for the amount was entered on the twentieth day of January, 1857. Afterwards notice of intention to move to set aside report of referee, was given; a statement was prepared, and the motion was made.

The only point made on the motion was, that no ordinance authorizing the furnishing of gas for lighting the city-hall and engine-houses was introduced in evidence, and for that reason the city was not liable.

On the seventh of March the Court ordered that so much of the said report of the referee as allowed the plaintiff for gas furnished for the engine-houses and city-hall, (being the amount claimed in the second count,) be set aside, and that said report in all other respects be confirmed, and that judgment be entered accordingly.

Judgment was entered in accordance with this order, March 18, 1857, in favor of plaintiff on the first count, and against the plaintiff on the second count; also vacating the judgment entered January 20, 1857.

Plaintiff appealed from so much of said last-mentioned judgment as was against plaintiff on the second count, and that portion of the judgment vacating the former judgment; also, from so much of the order of March 7th as set aside the report of the referee as to said second count, and asked that the portions of the judgment and order appealed from be reversed, and that the judgment be so modified as to give judgment in favor of plaintiff for the whole amount.

*N. Bennett, Lorenzo Sawyer, and Jo. G. Baldwin, for Appellant.*

Appellant makes the following points. The question before the Court arises on the second count only.

1. The Court erred in setting aside the report of the referee, as to the sum found due under the second count, for gas furnished for lighting the city-hall and fire-engine-houses, and ordering judgment accordingly.

The complaint was verified by oath, and the allegations of the second count were not denied in pursuance of the provisions of the statute, and the allegations of said count for the purposes of this action must be taken as true. No proof, whatever, is required upon this count, there being no issue joined. It was not necessary, therefore, to introduce any ordinance, if there was one.

The only answer to the allegations of the second count is in the following words, to wit: "And this defendant, further answering, saith, that this defendant has no knowledge or information in relation to the allegations in the second count; and, therefore, denies the same."

The Practice Act, as amended in 1854, section forty-six, provides that: "The answer of the defendant shall contain—first, if the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof, according to his information and belief," etc. And section sixty-five provides that: "Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall, for the purposes of the action, be taken as true."

Now, there is no "specific denial of each allegation;" and if there was, the form of the denial is insufficient. Defendant says it "has no knowledge or information, \* \* \* and therefore denies the same."

There is no denial, "according to his information and belief." The defendant may be fully satisfied, and firmly believe, and, in fact, morally certain, that every allegation is true, and yet make the denial in this form; while it could not be denied in the form prescribed by the statute. The statute is thus evaded; and the object of the provision defeated, if this form of denial be admissible.

Under sections forty-six and sixty-five there was, then, no issue, and the allegations of the second count must be taken as true. The referee could not have done otherwise than find for the plaintiff on that count, had there been no evidence at all. No evidence was required.

And this Court so held, in *Anderson v. Parker et al.*, 6 Cal. R., 197.

So, under a similar provision of the New York Code, of 1848 and 1851, it has been repeatedly held that a general answer, like the above, is insufficient. The Court say, in *Seward v. Miller*: "It is important, in every case, that the defendant should specify which allegations he deems material, and intends to controvert, in order that plaintiff may clearly know what is denied, and what may be necessary for him to prove. It is particularly so for many reasons, when defendant is required to swear to his answer." *Seward v. Miller*, 6 How. Prac. R., 312; *Rosenthal v. Bush*, 1 Code R., (New Series,) 228.

Again, the form of the denial is insufficient, for reasons above stated. *Edward v. Lent*, 8 Prac. R., 28; *Ketchum v. Zeroga*, 1 Smith, 554. And the facts are presumptively within the knowledge of defendant; and in such cases the defendant, whether an individual or a corporation, is not at liberty to deny knowledge or information. *Sherman v. New York Cent. Mills*, 1 Abbott, 187; *Thorne v. New York Cent. Mills*, 10 Pr. R., 20.

The Court erred, then, on this ground alone, in setting aside the report of the referee as to the second count, and in entering judgment accordingly.

2. Upon the facts found by the referee, from the testimony,

the plaintiff is bound to recover the amount found due under the second count, and it was erroneously set aside.

Corporations may become liable by implication, like individuals; and under the facts and circumstances of this case as found, it was not necessary to the validity of the claim that there should have been an ordinance to authorize the furnishing of gas for this purpose, and the case does not, as supposed, fall within the rule laid down in *Lucas, Turner & Co. v. The City of San Francisco*, 7 Cal., 463.

The want of an ordinance was the only point made by defendant's counsel, and defendant relied upon the case of *Lucas, Turner & Co. v. The City of San Francisco*. In that case, however, the suit was brought upon a written contract in relation to matters arising under peculiar and special provisions of law, to wit: for improvement of public streets. (See Art. III, Sec. 13, and Art. V, of Charter of 1851.) These are improvements not absolutely necessary to the transactions of the ordinary business of the corporation, and from which the public only derive a partial benefit and private citizens are the greatest beneficiaries, in consequence of the enhancement of the value of their property. Hence the law prescribes that the property benefited shall pay the greater portion of the expense. And for the protection of the city as well as the corporation, certain formalities are required to be observed in making contracts, and unless these formalities are observed, there is no liability upon the contract as such. This appears to be the point of the decision of that case, and it was decided under the provisions of the act above cited; the question arising under those sections.

But section thirteen of article three only provides for the formalities to be observed in the exercise of those powers which are of a governmental nature—its police powers—or those powers of a sovereign nature delegated to the local government, such as require, in the language of the section, "necessary laws," as will be seen by examining the language of the section, and the various objects referred to. It does not refer at all to the ordinary necessary incidental expenses that are arising and recurring from day to day, and cannot by any possibility be avoided.

The expenses in this case are incurred by virtue of the ordinary powers incident to every corporation without being conferred in express terms. And they are no part of its governmental or police powers, and do not come within the purview of those powers that require "laws" enumerated in section thirteen.

Had the gas been furnished to a natural person in a similar manner, there can be no doubt of his liability to pay what it was reasonably worth. The law would imply a promise to pay, and a promise may also be implied under similar circumstances on the part of a corporation.

"Therefore, where one built a school-house under contract

with persons assuming to act as a district committee, but who had no authority, yet a district-school was afterwards kept in it by direction of the school-agent; this was held to be an acceptance of the house on the part of the district, and binding the inhabitants to pay the reasonable value of the building." *Syllabus*, 7 Greenl., 96.

The Court says in this case, "If one accepts or knowingly avails himself of the benefit of services done for him without authority or request, he shall be held to pay them a reasonable compensation for them. So, in the present case, the same principle may be applied." *Abbott v. Third School-District in Herman*, 7 Greenl., 98.

So, a corporation was held liable for the benefits received when the statute required a particular form to render it liable on an express contract. In the *Episcopal Church Society v. Episcopal Church in Dedham*, the Court say: "In a legal point of view, however, the church or proprietors were only a voluntary religious society, and after the passing of the statute, could make contracts only through the organs appointed by the statute, viz.: the rector, wardens, and vestry: so that the note given by the rector and wardens only under a vote of the proprietors, would bind the proprietors only as joint-contractors associated together as partners, and not as a corporation. Nevertheless, if the debt of which the note is evidence was incurred for the benefit of the corporation, which was made by the statute to represent the church or the proprietors, and the money procured actually went to their use, they knowing the circumstances under which it was procured, an action must certainly lie to recover the money; otherwise, manifest wrong and injustice would be done." *The Epis. Ch. Society v. Epis. Church in Dedham*, 1 Pick., 373.

Here, although the contract was void, the corporation was held liable for benefits enjoyed with the knowledge of the officers.

In case of *Proprietors of the Canal Bridge Co.*, the question was, whether the corporation could be bound by implication. No positive corporate act could be shown, except a mere acquiescence in certain proceedings by another corporation without objection for a considerable period of time. The Court say:

"The question is then narrowed to this, have the proprietors of the Canal Bridge assented to this proposition and acted under it? We find no vote to this effect, but we do find that the cross-bridge was suffered to unite with theirs pursuant to the proposition, and that for four years all were suffered to pass without toll who came from Charlestown to Cambridge, or *vice versa*. Now, corporations can be bound by implication as well as individuals, as has been before stated, and no act can be stronger to show an assent to a proposition, an agreement, or bargain, than those we have just mentioned." *Proprietors of Canal Bridge v. Gordon*, 1 Pick., 308.

And generally "whenever a corporation is acting within the scope of the legitimate purposes of the corporation, all parol contracts made by its authorized agents are express contracts of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action will lie." *Danforth v. Sco. Turnpike Co.*, 12 Johns. R., 230; *Dunn v. Rec., War., etc., St. Andrew's Ch.*, 14 John. R., 118-19; *Patterson's Heirs v. B'k Col.*, 7 Cranch, 306.

And municipal corporations are responsible "in the same manner as other corporations, and private individuals are responsible on their promise, express or implied." See syllabus *Clark v. City of Washington*, 12 Wheat., 40; *Ross v. City of Madison*, 1 Carter, 283; *The City of New York v. Bailey*, 3 Hill, 531; *Ib.*, 2 Denio, 433; *Goodloe v. City of Cincinnati*, 9 Ham., 513; *Rhodes v. Cleaveland*, 10 Ohio R., 159; *McComb v. Town of Akron*, 15 Ohio R., 479; and the numerous cases cited in these authorities.

To show that there is no distinction between corporations and natural persons, where an implied promise to pay is sought to be raised, the following authorities are cited: 7 Greenleaf, 96, *Abbott v. Third School-District in Herman*; *Episcopal Church Society v. Episcopal Church in Dedham*, 1 Pick., 373; *Proprietors of Canal Bridge v. Gordon*, 1 Pick., 368; *Danforth v. Sco. Turnpike Co.*, 12 Johns. R., 230; *Denn v. Rec. War., etc., of St. Andrew's Ch.*, 14 Johns. R., 118-19; *Patterson's Heirs v. Bank of Columbia*, 7 Cranch, 306.

The work of Angell & Ames, though purporting to treat merely of private corporations, yet, when speaking of the matter now under discussion, cites cases of municipal and private corporations indifferently, to sustain the positions taken. (§ 379.)

In *Stafford v. The Corporation of Albany*, (6 Johns. R., 1,) it was held that *assumpsit* would lie against the corporation on an implied promise to pay the amount of damages, assessed by a jury, for the land of the plaintiff, taken by the corporation. This point, it is true, was not raised in the case, nor specially passed on by the Court—both counsel and Court seeming to have taken it for granted that implied *assumpsit* would lie.

The case of *The Overseers of North Whitehall v. Overseers of South Whitehall*, 3 Serg. and Rawle, 117, shows that the same rule applies in Pennsylvania. In this case both parties were municipal corporations; yet, it was held, that implied *assumpsit* would lie to recover the expenses of a town pauper, which had been paid by the plaintiff for the benefit of the defendant.

The rule contended for was upheld in *The Baptist Church v. Mulford*, 3 Halsted R., 182.

Actions on an implied *assumpsit* have, in almost innumerable instances, been sustained against religious corporations. The

case of *Smith v. First Congregational Meeting-house*, 8 Pick., 177, is one of the many instances which might be enumerated. And religious corporations, in their chief scope and aim, the general welfare and prosperity of the community, appear to resemble municipal corporations more closely than they do private corporations.

The case of *Brady v. The Mayor, etc., of Brooklyn*, 1 Barb. Sup. C. Rep., 584, is our very case, not only as respects the form of the action, but also the principle on which we seek to charge the defendant. The declaration contained the common counts for work and labor, and materials, together with the money counts, and an account stated, being the same in substance as our complaint. The plea was the general issue—the same as the answer of the defendant. There was no proof, on the trial, of any ordinance authorizing the indebtedness for which the plaintiff brought his action. The claim was purely of an equitable nature; but it arose under circumstances, which, if the action had been against an individual, would have warranted a recovery upon an implied *assumpsit*. And the Court held that such recovery might be had in that case. And yet the defendant was a city corporation—a municipal corporation. The Court resolved, in effect, in their opinion and by their judgment:

1. That corporations have all the powers of ordinary persons, as respects their contracts; except where they are restricted, expressly, or by necessary implication.

2. Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all its contracts, whether sealed or unsealed, written or by parol, are valid.

3. That subsequent acts of the corporation might operate as a ratification of a claim which had originated without any authority.

4. That after such acts of implied ratification, the corporation could not shield itself from responsibility, by denying its liability, and by contesting the claim in a suit brought to recover it. And these principles are laid down and approved in a suit, too, in which, as has been said, the defendant was a municipal corporation.

The Supreme Court of Pennsylvania, in the case of a municipal corporation, *Alleghany City v. McClarken & Co.*, 14 Penn. State Rep., 81, place this view of the question in a clear and proper light. The case is, in fact, decisive of the case at bar. Mr. Coulter, J., says, "I take it for granted that it (the charter of the city,) contains no express authority to the corporation to issue such notes as those embraced in this action." These were small notes, issued for circulation as money at the time, and there was a statute expressly prohibiting the issuing of such notes. "But," continues the Judge, "it does not follow, that the corporators are not answerable for them in their corporate

capacity. They have received value for them in the various public improvements erected and made in the city, through their instrumentality, and it hardly comports well with fair dealing, that they should seek to exonerate themselves from a debt, on this account, contracted by them through their accredited agents, and with their silent acquiescence. It is not universally true, that a corporation can not bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly, and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted."

The true rule, as adopted and practiced in the United States, is undoubtedly laid down in *Bulkley v. Derby Fishing Company*, 2 Conn. Rep., 254. Swift, Ch J., says: "A corporate act is not required in all cases. It is sufficient if there be a usage and practice under such circumstances as may be presumed to be within the general knowledge and by the consent of the company. If any officer vested with certain powers should, in any instance, violate them, and attempt illegally to subject the corporation to any obligation, such corporation may, instantly, on discovering, disavow the act, and prevent a repetition. And, then, as there will be neither law nor usage to sanction the transaction, it will not be binding. But when the corporation will suffer such practice to continue, it is presumed that it is done with their consent, and be made obligatory upon them." 2 Conn. Rep., 255.

Mr. Justice Hosmer observes, in the same case: "More than a century ago, the case of *Rex v. Biggs*, 3 P. Wms., 419, went the full length of deciding that, as against a corporation, an authority to its agents different from the prescriptions of its charter might be implied. Although this decision has, on some occasions, been lost sight of, yet it has been abundantly recognized by modern determinations, and is unquestionably established." 2 Cranch, 168; 2 J. R., 114. The cases cited by Hosmer, J., which he claims have departed from the correct rule, are the very cases on which the counsel for the defendant relies.

"I consider it undoubted law," continues Mr. Justice Hosmer, in the same case, "that a corporation may incur a liability different from the prescriptions of its charter. Like individuals, it is responsible in the manner in which it permits its agents to hold it out to the world. The corporation should disavow the practice or usage of its agents in the transaction of business, or they shall be presumed to have its sanction. An authority to contract in a particular mode may be proved by a vote of the stockholders, and in prevention of fraud and prosecution of justice it may be presumed. It may be implied, from the acquiescence in the usual mode of transacting the busi-

ness of the corporation, and expressing no objection to it, for *qui non prohibet cum prohibere possit, jubet.*"

In the same case, Mr. Justice Gould expresses similar views in an able opinion. The attention of the Court is invited to the entire case, as containing a lucid exposition of the rules of law applicable to the liability of corporations, where they depart from the rigorous requirements of their charters. *White v. Derby Fishing Company*, 2 Conn. R., 261, is also to the same effect.

3. Under the circumstances of the case, and the state of facts found by the referee, the defendant is estopped from denying its liability.

The rule in regard to estoppel is thus correctly laid down by Judge Parsons, in his work on Contracts, (vol. 1, p. 118.) "In general, if a person not duly authorized make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent."

In *Selma and Tenn. R. Co. v. Tipton*, 4 Alab. R., 808, it is held that "not only estoppels, technically so called, but estoppels in pais, operate both for and against corporations."

And that municipal corporations are responsible in the same manner as other corporations and private individuals, see authorities cited above, and particularly *Clark v. The City of Washington*, 12 Wheat., 40; *Ross v. City of Madison*, 1 Carter, 283.

"Matter in pais, as I understand the phrase, is where some admission has been made—or some act done or acquiesced in—or some party has permitted an act to be done for his benefit, knowing the fact, without objection—or has failed to speak out when he ought to have done so, and by reason of the same another party has been induced to part with some advantage, or, in some respect, to change his position." *Dezell v. Odell*, 3 Hill's R., 219, 221; 1 Greenl. Evid., § 207.

Now, in the case at bar, there is matter in pais. There is a practice of furnishing the city with certain necessities, as old as the city itself. Lights, for the same purposes, have always been furnished upon the same authority and in the same manner, and down to the introduction of gas, paid for by the city. The bills were duly presented to the city with the terms specified, through the officers prescribed by the charter and ordinances, as the medium of communication, and for a long time were audited and allowed monthly, and warrants were regularly issued by the officers who were expressly charged with this duty by the charter and ordinances. And the gas-fixtures were paid for by the city, and the city enjoyed the benefit for a long time, with knowledge and without objection.

*F. M. Haight* for Respondent.

1. If a defendant has neither knowledge or information, he can not have any belief, and need not express any. Such is the rule in chancery, from which this part of the Code is taken. *Morris v. Parker*, 3 John. Chan. Reps., p. 297. In this case it is said: "When a defendant answers that he has not any knowledge or information of a fact charged in complainant's bill, he is not bound to declare his belief one way or the other." He can not have any belief, if he has neither knowledge or information, and the Practice Act, when it requires an answer upon information or belief, means no more than if a defendant has information upon the matter, he shall state his belief, but if he denies all knowledge and information, it is neither required by the act, nor by any known rules of pleading, or by common sense, that he should state his belief. The forty-sixth section of the Practice Act requires either an absolute denial, or a denial upon information and belief. In this case there is an absolute denial. The defendant states that the defendant has no knowledge or information, and therefore denies, etc. The reason for the denial may be stricken out, and the absolute denial remains. The mistake of the appellant's counsel is in supposing the act required, in all cases, a denial on information and belief. It does not require any such averment. It requires either a denial, or a denial on information or belief.

2. The second objection is, that the answer being general, the allegations of the second count are admitted, and that entitles plaintiff to a judgment. This is a *non sequitur*. If all the allegations are admitted, the plaintiff is not entitled to any judgment on this count. There are no specific allegations within the meaning of the statute, as was the case in *Anderson v. Parker*. There is a general allegation of having furnished gas to defendants, and that, in consideration thereof, defendant promised to pay, etc. These are general allegations, like any common count, and is not the case where a specific allegation, necessary to the action, requires a specific denial. General allegations may be met by a general denial. But there really is no dispute about the facts.

3. The defendant is a corporation, and can not answer under oath. In this State our Code has always been construed in reference to the old analogies. See 1st Barbour's Chancery Practice, p. 156.

4. Municipal corporations have no powers except those granted, or such as are necessary to carry into effect powers granted. Bacon's Abridgement, Tit. Corporation, letter D., ed. of 1854. "A corporation is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits to its operations, beyond which it cannot regularly proceed." See the numerous authorities cited in notes. Kent's Com., vol. 2, p. 298; *Halsted v. Mayor of New York*, 3 Comstock, 430, and the case there re-

ferred to of *Hodges v. The City of Buffalo*, 2 Denio; 1 Duer, 505; 4 Sanford, 421-22; Conn. R., 552, *New London v. Brainard*.

Assuming this proposition to be correct, it follows that a municipal corporation can contract only in the mode, and for the objects, specified in the charter. It has no general ability, like a natural person, but having only the capacity to contract for specified objects, and in a certain specified mode, its contracts are void, unless within the powers granted, both as to the subject of the contract, and manner of its creation and execution. Smith's Commentaries, § 677, p. 790.

5. Municipal corporations are governmental agencies, and the Mayor and Common Council of the City of San Francisco, under the charter of 1851, had, within certain defined limits, power by legislation to make contracts for various purposes, and to control and set in motion the executive branches of the government. In this case, the claim is for gas furnished without any action of the common council, but upon an implied ratification. The plaintiff has appealed, because a portion of his claim was rejected, and the point is presented, whether a government or quasi government, as a municipal corporation, can contract in any other manner, or become liable in any other manner than in accordance with its organic laws.

The case of *Phelan v. The County of San Francisco*, 6 Cal. R., 536, covers the point, and is conclusive. The argument as to the analogy to be drawn from the liability of municipal corporations for torts is well explained, in the case of *Bailey v. The Mayor, etc., of New York*, 3 Hill, p. 540. This case, and the authorities referred to, will illustrate the whole of this class of cases.

Where powers are granted for public purposes, they can only be exercised in the mode and manner prescribed. It is also equally true that a municipal corporation, as to its property, is to be regarded as other corporations, and its private rights are upon the same footing.

At the October Term, 1857, BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was a suit to recover from the defendant compensation for gas furnished by the plaintiff. There are two counts in the complaint; the first, upon a written contract, and the second, a common count for gas. The answer of defendant to the second count was this:

"And this defendant further answering saith, that this defendant has no knowledge or information in relation to the allegations in the second count; and, therefore denies the same."

The case was referred, by consent, to a referee, who reported a judgment for the plaintiff upon all the counts. The report of the referee was set aside as to the judgment upon the second, and the plaintiff appealed.

It is insisted by the plaintiff, that the answer of the defendant to the second count made no issue.

The complaint being verified, the answer must contain a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof, according to his information and belief.

The plaintiff makes two objections to this answer; *first*, that it does not deny the allegations of the complaint, according to information and *belief*, but simply alleges a want of knowledge or information; *second*, that the facts alleged in the second count of the complaint are of such a character, that the defendant must be presumed to know whether they are true or false, and can not be permitted to answer in the manner stated.

The second count alleges that the plaintiff, at the request of the defendant, furnished to said defendant a large quantity of gas for lighting the city-hall and fire-engine-houses belonging to defendant; that the gas was used and consumed by defendant, and was furnished from November, 1854, to June, 1856, and was worth the sum of \$18,188 98-100.

In the case of *Thorn & Maynard v. The New York Mills*, (10 Howard's Pr. Rep., 19,) it was held that when the facts alleged were presumptively within the defendant's knowledge, he must admit or deny positively, unless there be something special in the circumstances of the case. Justice Bacon, in delivering the opinion of the Court, says:

"And, therefore, the true distinction to be observed in determining when a defendant may avail himself of the privilege accorded to him, of answering in the qualified form allowed by the Code, and when he must positively admit or deny the allegation, is to inquire whether the fact alleged is presumptively within the defendant's knowledge." The suit in that case was upon a promissory note, alleged to have been made by the defendant, and it was held that the answer must be in the form positive.

When, from the nature of the fact alleged, it must be presumptively within the knowledge of the defendant, the answer should be positive, one way or the other; and a denial, according to his recollection, will be considered as an evasion. (*Taylor v. Luther*, 2 Sum., 228.) But when the fact is not presumptively within the knowledge of the defendant, then a denial of all knowledge and information upon the subject is amply sufficient. It is unnecessary for the party to deny that he has any belief in reference to the fact, when he has already denied all knowledge and information from which a belief could be formed.

But the question arises, whether the rule should apply to municipal corporations. That it should apply to other corporations there would seem to be no doubt. There is, however, a marked distinction between the two kinds of corporations. This dis-

tion is stated in the opinion of this Court, in the case of *Holland v. The City of San Francisco*, (April, 1857.) A municipal government is, in fact, a part of the State government, exercising subordinate legislative powers over a certain community, within a defined district; and the ends contemplated by its creation are different from those intended by other corporations. The same rule, therefore, can not be applicable to them in reference to this question. Suppose the Legislature should pass an act permitting suits to be instituted against the State, it would hardly be contended that this rule would apply to her officers. The business of a city so large as San Francisco, requiring so many ordinances as to form a large volume, is too extensive and complicated to justify the application of this rule to its officers. The officers are changed every year, and it would be too difficult for the new incumbents to inform themselves of all past transactions. A party who deals with the officers of a municipal corporation should see that they had authority to bind the corporation.

We think the answer in this case sufficient, and that there was no error in the decision of the Court below.

Judgment affirmed.

At the same term a re-hearing was granted, and at the present term, Field, J., and Burnett, J., delivered separate opinions in the case.

FIELD, J.—This case was before this Court at the last October Term, and the judgment of the Court below was then affirmed. A re-hearing having been granted, the appellants contend that they are entitled to recover the amount claimed in the second count upon the pleadings, and also upon the merits of the case, as disclosed by the report of the referee.

On the first hearing it was held by my associates that the answer was sufficient to raise an issue; and, that the rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, does not apply to municipal corporations. I did not then concur in the opinion of my associates. I do not concur now. I think the answer fatally defective in not denying any of the allegations of the second count, either positively or according to information and belief; the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice, and can not have any legal effect. The answer is that the defendant has "no knowledge or information" in respect to the allegations of the second count, "and therefore denies the same." But the statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and

agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form. Such knowledge or information will be obtained before trial, if a defence is interposed, and there is no good reason why it should not be obtained before answer. In the case at bar, the facts alleged are presumptively within the knowledge of the officers of the corporation, and the denial should have been made positively. Any other form of denial in such cases is an evasion of the statute. In the opinion referred to, the general rule is admitted, but municipal corporations are excepted from its operation. I am unable to find any authority for the exception. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. It does not give one rule to determine the effect of a pleading when the defendant is an individual, and another and different rule when the defendant is a municipal corporation. It prescribes certain requisites to good pleading, and certain consequences to bad pleading; and corporations are not exempted from its provisions. By the rules it gives, is the sufficiency of the pleadings to be judged. Its language is: "All the forms of pleading in civil actions and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed by this Act." (Prac. Act, § 37.)

In *Thorn et al. v. The New York Central Mills*, (10 How., 20,) the complaint was upon a promissory note, alleged to have been executed by the defendant, (a corporation,) to the plaintiffs, by an agent duly authorized, and was verified. The defendant put in the following answer, verified by one of the directors of the company: "This defendant has *no knowledge or information* sufficient to form a belief, that it did at the time, for that purpose stated in the complaint by its authorized agent, make its promissory note, by the name and for the amount, as in this respect set forth in said complaint, or that it is indebted to the said plaintiffs upon such a note as is in the said complaint mentioned." A question as to the sufficiency of this answer was raised, in the decision of which Bacon, J., of the Supreme Court of New York, laid down the rule above stated, and held it equally applicable to corporations as to individuals. "A corporation," says the Justice, "is as much bound to know whether it has entered into contracts, made purchases, given promissory notes in the course of its business, and by its appropriate agents, as an individual. I have serious doubts, indeed, whether a corporation is permitted to answer in any case in the form adopted in this cause. How can —, an individual director, know that "it" (the corporation, as it is styled in the answer,) has no knowledge, information, or belief, in the premises? The intangible, incorporeal entity may not have, and such a thing is not predicable of a cor-

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Gas Company v. San Francisco.

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poration, but *non constat* that some other director or officer may not have all the knowledge or information necessary to form a full and perfect belief. Where is the agent who gave the note, where the bill-book of the company, or the appropriate entries to show the transaction out of which the note may have sprung? \* \* \* I hold, therefore, that in this case the defendant was bound to know, or, at least, to inquire, and thus gain the information as to the fact of the existence of the note in question in this suit, and that the company are not at liberty to answer otherwise than by an explicit admission or denial of the giving of the note."

The case above is one of three cases brought against the same defendant upon promissory notes, in each of which the same answer was filed; and in each the same decision was rendered and an appeal taken to the general term of the Supreme Court. The case on appeal is entitled "*Shearman v. The New York City Mills*," and is reported in 1 Abbott, 187. The Court held the answer insufficient, and said:

"If a corporation may answer in this manner in one case, it may in all cases. It is, from its nature, under the necessity of acting by agents. If, therefore, it were endowed with all the faculties of a natural person, it would have no actual knowledge of any facts.

"It could, therefore, in all cases, deny knowledge or information. But a corporation is an artificial being, which, from its nature, can have no knowledge or belief on any subject independent of the knowledge or belief of its agents. It is a mere legal entity. It neither knows nor thinks. If, therefore, this method of denial on the part of the corporation in this case be correct, a corporation cannot be compelled in any case to admit or deny any allegations, even those of its own organization. It can not be possible that the Legislature intended to grant to them any such dispensation."

These cases establish the position that, in pleading, the same rule must prevail with corporations as with individuals. The defendant, it is true, was a private corporation, and the opinion limits the exception in the application of the rule above mentioned to municipal corporations, assigning as the reason, the distinction between the two corporations stated in the case of *Holland v. The City of San Francisco*. The distinction alluded to refers to the double character of a municipal corporation; its public and political character, in which it exercises subordinate legislative powers, and its private character, in which it exercises the powers of an individual or private corporation. The very distinction, it appears to me, dissipates the exception taken, at least so far as the case at bar is concerned. It is admitted that the rule of pleading, for which I contend, is applicable to private corporations. The purchase of gas involves only the exercise of

a power of a private corporation; it requires no exercise of any political power. It is as much an act of a private character as if made by a private corporation. In truth, a municipal corporation, outside of its governmental capacity, is, in many respects, to be regarded the same as a private corporation, and its officers and agents through whom it acts must be presumed to know the contracts it enters into, the purchases it makes, and the property it uses. The knowledge of such matters must rest with some of its officers, and the corporation ought not to be permitted to shelter itself under an assertion of ignorance.

Having stated the reason for dissenting from the former opinion of my associates, I proceed to consider the case on its merits. The facts, as reported by the referee, are not disputed. From them, it appears that the plaintiff furnished the gas, according to the allegations of the second count of the complaint, amounting in value to the sum of \$18,188; that the gas was consumed in lighting the city-hall and fire-engine-houses belonging to the corporation; that it was furnished and used nightly for that purpose, from November, 1854, to June, 1856; that bills for the same were rendered monthly to the common council, and those previous to June, 1855, were audited and allowed, and the comptroller directed to issue his warrants upon the treasury therefor; that such warrants were accordingly issued and delivered to the plaintiff, but not being paid were returned and canceled, and the bills remain unpaid; that it was necessary to the efficiency of the fire department that the engine-houses should be lighted, and necessary for the convenience of the officers of the city in the discharge of their respective official duties, and for the due administration of the city government that the city-hall should be lighted; that the gas was used in the chambers of the common council during its sittings, in the offices of the mayor, comptroller, treasurer, police officers, and other public offices, whilst occupied by the mayor and other officers of the city, in the discharge of their official duties; that the gas was lighted and extinguished from time to time, by the officers themselves, or by their direction; and the meters and fixtures by means of which the gas was furnished and used in the city-hall and engine-houses, were put up and paid for by the corporation.

Upon these facts, the appellant asserts a right to recover against the defendant for the gas furnished. The respondent denies the right upon the sole ground that there was no evidence of any ordinance of the common council authorizing the furnishing of the gas. The proposition of the respondent is that a municipal corporation can incur no liabilities otherwise than by ordinance. The position, in its full extent, is not tenable. Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the prop-

erty or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be.

In *Abbott v. The Inhabitants of the Third School-District in Herman*, (7 Greenl., 96,) a school-house had been built under contract with persons, who assumed without authority to act as a district committee, but yet as a school was afterwards kept in it by direction of a school-agent, it was held that the building was accepted by the district, and that the inhabitants were bound to pay its reasonable value. The Court, in its opinion, says: "If one accepts or knowingly avails himself of the benefit of services done for him without authority or request, he shall be held to pay a reasonable compensation for them. So, in the present case, the same principle may be applied."

In *Ross v. The City of Madison*, (1 Carter, 281,) it was contended that the city was not liable, because no contract had been made by it for the construction of a certain culvert, which had occasioned the injury for which the suit was brought. The Court below instructed the jury that if they found that certain evidence adduced before them constituted all the written evidence tending to prove that the defendant authorized the construction of the culvert, they must find for the defendant. The Supreme Court held the instruction wrong, and in its opinion said: "It is well established that the contracts of corporations rest upon the same footing as those of natural persons, and are valid, without seal, whether expressly made by the corporation, or arising by implication from the general relations of the agent towards the corporation, or from the ratification of acts done on behalf of the corporation by parties assuming to act as agents, although without sufficient authority."

In *The Overseers of North Whitehall v. Overseers of South Whitehall*, (3 Sergt. & Rawle, 117,) it was held that implied *assumpsit* would lie to recover the expenses of a town pauper, which had been paid by the plaintiff for the benefit of the defendant. It was contended that the corporation was not liable to an action unless bound by a contract under its corporate seal, as in the present case it is contended that the defendants are not liable unless bound by ordinance. The objection in the two cases is the same in principle, as the ground of the objection is, that the consent of the corporation has not been given in the requisite manner. To this objection, Tilghman, C. J., said: "This point has been so much discussed, and so well settled, in other Courts, that I shall not go over the ground again, but content myself with expressing my opinion that the action may be supported on an implied contract, and with referring to the cases

of *Bank of Columbia v. Patterson*, (7 Cranch, 299;) *Danforth v. The Schoharie Turnpike Company*, (12 Johns, 227;) and *Hayden v. The Middlesex Turnpike Company*, (10 Mass. R., 397.)”

In *Alleghany City v. McClarkin & Co.*, (14 Penn., 81,) the plaintiffs claimed to recover the amount of certain small notes, or city-scrip, issued by the defendants, and the question was presented, whether the common council of a city, a municipal corporation, could subject their constituents to the penalty of the act of the Legislature forbidding the issuing of small notes as a circulating medium. The Court, per Coulter, J., said: “The Charter, or Act of Assembly, incorporating the city of Alleghany, was not produced or read on the argument; but I take it for granted that it contains no express authority to the corporation to issue such notes as those embraced in this action. But it does not follow that the corporators are therefore not answerable for them in their corporate capacity. They have received value for them in the various public works and improvements erected and made in the city, through their instrumentality, and it hardly comports well with fair dealing, that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited agents, and with their silent acquiescence. It is not universally true that a corporation can not bind the corporators beyond what is expressly authorized in the charter. There is power to contract, undoubtedly, and if a series of contracts have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. \* \* One rule of law is often met and counterchecked by another of equal force, so that although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them. They adopt the act, and are responsible to those who, on the faith of such acquiescence and approbation, trusted their agents.”

The reasoning of the Court, in this case, is applicable to the facts of the case at bar. The defendant has received the benefit of the plaintiff's labor and materials for over a year and a half, and it ill comports with fair dealing that it should now seek to exonerate itself from liability, and the law will fail to effect its true end, if the defence interposed can prevail. The position contended for by the respondent, it is believed, is asserted in this State for the first time. The reports in other States are full of adjudged cases where actions upon implied contracts have been sustained against municipal corporations. They have been argued by able and distinguished counsel, and decided by eminent

Judges, and the distinction has never been made between the liability of a private corporation and a municipal corporation, under circumstances analogous to those presented in the case at bar. Thus, in *Clark v. The City of Washington*, (12 Wheaton, 40,) the action was founded on an implied *assumpsit* to pay the amount of a prize drawn by a lottery-ticket for which the plaintiff claimed the city had made itself liable, in consequence of the acts of its agents and officers. Mr. Webster and the Attorney-General, Mr. Wirt, in the course of their argument, used the following language: "Where special duties are imposed upon corporations, which can only be performed through the instrumentality of their agents, the law will raise an implied *assumpsit*, under the same circumstances as in dealings with private individuals. It is enough to show a ratification of the acts of the agents, *by receiving the benefit of the acts*, or otherwise. In short, they are responsible, under these circumstances, for their promises, whether express or implied, in writing or by parol." The correctness of this position was not even questioned by the opposing counsel, and the point was not deemed of sufficient doubt to be noticed by the Court, in its decision; and judgment was ordered for the plaintiffs.

In *Powell v. Trustees of Newburgh*, (19 John., 284,) the action was brought to recover the expenses incurred by the trustees in the defence of an action brought against the corporation for discontinuing and obstructing a street. There was no contract in the case, except the implied contract which the law raised from the circumstances, yet the Supreme Court of New York held the plaintiff entitled to recover.

In *Brady v. The Mayor, etc., of Brooklyn*, (1 Barb., 584), the recovery was upon an implied *assumpsit*. There was no proof of any ordinance authorizing the indebtedness for which the action was brought.

Cases *ad infinitum* might be cited showing a general recognition in the Courts of the several States of the doctrine that municipal corporations, like individuals, may, under some circumstances, be held upon implied contracts. A corporate act is not essential in all cases to fasten a liability, and if it were necessary the law would sometimes presume, in order to uphold fair dealing and prevent gross injustice, the existence of such act, and estop the corporation from denying it.

Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied *assumpsit* arises against it. It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them without authority, have been ratified. "If offi-

cers of the corporation," says Story, J., in *Bank of U. S. v. Dandridge* (12 Wheat., 70,) "openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. \* \* In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them as matters of right, or matters of duty."

But not merely as I have stated will such presumptions be indulged; the corporation, in order to prevent injustice, will be estopped from denying the authority of its agents. "In general," says Parsons, in his work on Contracts, "if a person, not duly authorized, make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent." The doctrine applies equally to municipal as to private corporations.

I am of opinion that the order modifying the report of the referee should be set aside, the judgment entered on the eighteenth of March, 1857, be reversed, and that the judgment entered on the twentieth of January, 1857, should stand as the final judgment in the cause.

Ordered accordingly.

BURNETT, J.—Upon a re-argument, and a more careful examination, we are satisfied that our former opinion was erroneous.

We have lately held, in the case of *Humphreys and others v. McCall and others*, and *Curtis v. Richards and Vantine*, that there were but two forms in which the defendant can controvert the allegations of a verified complaint. In *both* of these forms, the denial of each controverted allegation must be *specific*. The statute is without exception. A specific denial of each allegation is a separate denial, applicable only to the particular allegation controverted.

The answer in this case gives rise to two questions:

1. Can a defendant excuse himself from a specific denial of each controverted allegation by stating that he has no knowledge or information in relation to the allegations of the complaint?

2. Conceding that he can not, does this rule apply to municipal corporations?

In reference to the first question, we may remark that the New York Code provides that the answer shall contain "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." (*Voorhies' Code*, p. 163, 5th ed., 1857.) Under our Code, as it was originally framed in 1850,

and as amended in 1851, the defendant might put in issue the allegations of the complaint by a denial of any knowledge thereof sufficient to form a belief. But this section was amended in 1854. As it now stands, the denial must be in one of the only two forms given. Under the act of 1850, the denial could be "according to information and belief, or of any knowledge thereof sufficient to form a belief." The section as amended has left out the latter portion of the section as it formerly stood, and has *thus* cut off the privilege of a denial of any knowledge sufficient to form a belief. This change in the language of the section must have been intended to secure a specific denial of each allegation.

It would seem, on first reflection, to be idle for the Code to require the defendant to deny *specifically*, according to his information and belief, when he states in his answer he has *no information, and, of course, no belief*.

But this conclusion, though apparently very clear, is not correct. When the facts alleged in a verified complaint are presumptively within the knowledge of the defendant, the Code requires his denial to be *specific*, not general. The object of the provision is to call the attention of the defendant, and to confine each denial to one allegation at a time, and not permit him to deny all at once. Under the equity practice the complainant usually annexed interrogations to his bill for the purpose of sifting the conscience of the defendant. Our system intended to accomplish the same result by requiring the plaintiff first to state the *facts* that constitute his cause of action, and then of the defendant, a specific denial of *each* allegation. The same reason which requires the defendant to be specific in this case, would equally require the denial to be *specific* where the facts are not presumptively within the knowledge of the defendant. The plaintiff may state in his complaint a number of facts, some of which the defendant could not specifically deny, according to his information and belief. But if he be permitted to make a sweeping denial, upon the ground that he has no information, he avoids the responsibility of denying each separate allegation. He may have information in reference to one of a number of alleged facts, and as to that *one* he believes it to be true; but if permitted to deny *generally*, he would be strongly tempted to say he had no information as to the facts alleged, and, therefore, denied the same. The object of the Code was to require a specific denial of the allegations of a verified complaint in all cases, without exception. This must have been the intention of the Legislature in amending the section. The object of the Code was to narrow the proofs upon the trial; and, to accomplish this end, the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation.

As to the second question, we are satisfied upon more mature

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Washburn v. Washburn.

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reflection that although there may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant, we can make no distinction, because the Code makes none. It is a matter for the Legislature, and not for the Court. The thirty-seventh section of the Code provides that "all the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in the act." The Code prescribes that the answer to a verified complaint shall be in one of two forms, in all cases, without any exception, and we cannot make one when the law has not made it.

We might be disposed to permit the answer to be amended, were we not fully satisfied of the intrinsic justice of the plaintiff's claim. The defence of the city is purely a technical one, and as it was not made in a technical manner, it should fail. For these reasons I concur in the judgment specified in the opinion of Judge Field.

TERRY, C. J.—I dissent.

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### WASHBURN v. WASHBURN.

In an application by the wife for a divorce on the ground of the willful neglect of her husband, and his failure to provide her with the necessities of life, for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit.

Willful neglect, whether accompanied with desertion or otherwise, is a distinct ground of divorce.

The neglect must be such as leaves the wife destitute of the common necessities of life, or such as would leave her destitute but for the charity of others. If those common necessities are provided by the earnings of either, there is no such willful neglect as is contemplated by the statute.

The earnings of both husband and wife go into a common fund, and become common property, the control and disposition of which belong to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree.

It must appear affirmatively on the part of the applicant that the husband was the owner of property sufficient to provide the necessities of life, and neglected to do so.

The ability mentioned in the statute has reference to the possession by the husband of the means in property to provide such necessities, not to his capacity of acquiring such means by labor.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The defendant obtained judgment in the Court below, and the plaintiff appealed.

The facts appear in the opinion of the Court.

*Chas. Halsey* for Appellant.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The plaintiff applied for a divorce, and alleged as the ground of her application the willful neglect of her husband, for the period of three years, to provide for her the common necessities of life, having the ability to provide the same.

It appears from the testimony that the parties were married several years ago, and lived together until about eleven months preceding the application; that the defendant is an able-bodied man, a seaman by occupation, of idle habits, and an occasional tippler; that he has not made any provision for the support of his wife for the last four years, but that during this period, she has supported herself by her own earnings; and that, in the opinion of the witnesses, he might have obtained employment as a first or second officer of a ship, at wages from forty to eighty dollars per month.

The residence of the husband with the wife, within the three years, is not an answer to the application. They were not living together at the commencement of the suit. The statute provides for cases of desertion; and willful neglect, whether accompanied with desertion or otherwise, is a distinct ground of divorce. (Divorce Act, § 4.) But the neglect must be such as leaves the wife destitute of the common necessities of life, or such as would leave her destitute but for the charity of others. If those common necessities are provided by the earnings of either husband or wife there is no such willful neglect as is contemplated by the statute. The earnings of both go into a common fund, and become common property, the control and disposition of which belong to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree, and the application must fail. In the present case the earnings of the plaintiff were sufficient for her support, and were applied to that purpose, and it does not appear that the defendant ever exercised control over them or interfered with their use.

If the earnings of the wife are laid out of consideration, the application must still fail, for, aside from such earnings, it does not appear that the defendant was at any time the owner of property sufficient to provide the necessities of life. This should appear affirmatively on the part of the applicant. The ability mentioned in the statute has reference to the possession by the husband of the means in property to provide such necessities, not to his capacity of acquiring such means by labor.

In *Mary F. v. Samuel F.*, (1 New Hamp., 198,) the libellant alleged, as ground of divorce, the voluntary absence of her husband for three years without making suitable provision for her

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support. It appeared from the testimony that the defendant was a laboring man, and that during his absence he had been in good health and able to work; but it did not appear that he possessed any property, and the Court said:

"The evidence is not sufficient to authorize us to decree a divorce in this case. No neglect of a husband, in cases of this kind, to make provision for his wife's support is a good cause of divorce, unless it was in his power to do so; and we are of opinion that the husband cannot be considered as having the power to make such provision, within the meaning of the statute, unless he has property. It is not enough to show that he has been able to labor; it must be distinctly shown that he has actually had property sufficient to enable him to make such provision."

Judgment affirmed.

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### JUDSON v. ATWILL.

Where there is a misdescription of a note, and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor.

The requirements of the Insolvent Law must be strictly followed; a failure to comply with its provisions, will deprive the petitioner of its benefits.

If an insolvent does not know the name of the owner of notes executed by him, he must state that circumstance in his schedule. In a suit on the notes, the absence of such statement can not be obviated by proof at the trial.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This action was brought on four several promissory notes, executed by the defendant. The notes are payable to the "order of E. Judson," but are described in the schedule of debts and liabilities, annexed to the defendant's petition in insolvency, as drawn in "favor of Mr. Farnum," without further particulars. On the trial, evidence was introduced, tending to prove the delivery of the notes to Farnum, as agent of the plaintiff, and ignorance of the real creditor, by the defendant, when the notes were executed, and when his petition in insolvency was presented. The Court instructed the jury, that by reason of the misdescription of the notes, and want of specification of the name of the real creditor, the proceedings in insolvency constituted no bar to the action, even if they believed the defendant did not know, at the time of their execution, and on the presentation of his petition, that the plaintiff was the real creditor; and this instruction the plaintiff assigns as error.

*Janes, Lake & Boyd*, for Appellant.

1. The decree of discharge of appellant in insolvency, made in the Fourth District Court, was a bar to the action. *Wood's Digest*, 499, § 24.

2. The question whether appellant knew, at the time of contracting the debt, and at the time of presenting his petition in insolvency, to whom said notes were made payable, or to whom they belonged, should have been submitted to and been passed upon by the jury.

*R. R. Provines* for Respondent.

The judgment of the District Court is correct, and the record discloses no error of which the appellant can complain. His discharge in insolvency was properly rejected, when offered in evidence by him :

1. Because the plaintiff was not named as one of insolvent's creditors in the schedule accompanying the petition on which such discharge was obtained.

2. Because the notes on which this action was brought, were not described in said schedule.

3. Because, if insolvent was in fact ignorant of the name of the holder or payee of said notes, the fact of such ignorance was not stated in his said schedule.

4. Because the notes mentioned in the schedule, which the defendant on the trial claimed to be intended for the notes sued on herein, were described as made payable to another person, who was not shown ever to have been, and who never in fact was the holder of these notes in any sense, or for any purpose whatever; and such description, instead of apprising the plaintiff that the insolvent sought to be discharged from his demands against him, tended only to deceive him, and lull him to security and indifference. *McAllister v. Strode & Beard*, 7 Cal. R., 428, and the cases there cited.

FIELD, J., after stating the facts of the case, delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The third section of the Insolvent Act requires the petitioner to give, in his schedule, "the names of his creditors, if known;" and the twenty-fourth section restricts his release and discharge to debts and liabilities specified in the schedule. The requirements of the act must be strictly followed; a failure to comply with its provisions will deprive the petitioner of its benefit. (*Cheever v. Hays*, 3 Cal.; *McAllister v. Strode et al.*, 7 Cal.) In the case at bar, the schedule does not give the name of the plaintiff as a creditor, nor does it state that the defendant was ignorant of the name of the owner of the notes. If the petitioner did not know the name of the owner, that circumstance should have been stated in his schedule. The absence of such state-

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ment can not be obviated by proof at the trial. The creditor looks for information to the proceedings of the insolvent on file, and if, in the schedule, he finds his name omitted, or the debt to him so incorrectly described as to leave him in ignorance whether intended to be set forth at all, he ceases to interest himself in the proceedings, and, perhaps, to contest the petition. The knowledge or ignorance of the petitioner, in the absence from the schedule of all statement as to his knowledge of the owner of the notes, could not affect the right of the plaintiff to recover.

The instruction of the Court was correct, and the judgment is affirmed.

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### WELLS, TRUSTEE, v. STOUT *et al.*

An agreement for separation between husband and wife, entered into through the intervention of a trustee, is not invalid as against public policy, and will be upheld and enforced, if followed by immediate separation, or if separation has previously taken place.

A conveyance of land on the part of the husband to a trustee, securing the payment of an annuity to the wife, in consideration of an indemnity by the trustee against all debts of the wife, for maintenance or other account, is valid and supported by a sufficient consideration.

A provision made by the husband for the wife is not void as against *subsequent* creditors, provided the husband is solvent at the time.

Subsequent reconciliation and cohabitation will avoid a deed of separation; the maintenance of the wife becoming thereupon obligatory upon the husband, the consideration of the deed fails.

Mere hearsay evidence of the wife having given birth to a child more than a year after the separation, and connecting therewith the name of a third party as its reputed father, raises no presumption of access by the husband.

Mere access is not sufficient, if proved, to establish such a reconciliation and cohabitation as will avoid a deed of separation. To effect that end, the reconciliation must be permanent, and followed by cohabitation, and restore the former relation of the parties.

The rule as to the presumption of access applies only to cases affecting children, and has no application to the parties.

The Court is bound to take judicial notice of the general laws in force in this State at the cession of California, which remained unrepealed until the act of April 22, 1850. Those laws are not regarded as foreign so as to require proof of their existence.

An execution issued upon a judgment of the District Court rendered in 1850, before the judgment was signed by the District Judge, is void, and a sale under such execution passes no title to the purchaser.

Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued.

APPEAL from the Superior Court of the City of San Francisco.

This is a suit in equity, to enforce the covenants of a deed of separation, entered into between William Stout and his wife, Mary Stout, through the intervention of a trustee. The deed was executed by the husband and wife at San José, on the 16th

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of February, 1850, in the presence of several witnesses, of whom the defendant, Jacob W. Stout, was one. The parties had previously agreed upon Talbot H. Green as trustee, and he had consented to accept the trust. On the day following the execution of the instrument by William and Mary Stout, it was taken by William Stout to San Francisco, and there delivered to the trustee, who read it over and signed it. The day afterwards, whilst on his way to the office of the alcalde, for the purpose of placing the deed on record, he was served with notice from the sheriff's office, that unless he made a certain payment, the lot described in the deed would be sold; and thereupon he proceeded to consult his counsel, who advised him not to act without a bond of indemnity against suits. He then wrote to Mrs. Stout, requesting her to send him a bond. Whether his letter was ever received does not appear; but no bond was sent to him, and he left the deed with his counsel, without any instructions as to its disposition. There is some conflict in the testimony, whether any further action was taken by the trustee. One of the witnesses testifies that he applied in December, 1850, or in January, 1851, for a lease of the premises described in the deed, and to an inquiry as to the title, was informed by the trustee that the property was held by him in trust for Mrs. Stout. The deed was recorded in the office of the alcalde, in a book designated as "Miscellaneous Records," on the eighteenth day of April, 1850.

The deed recites that William Stout and Mary his wife, "in consequence of various unhappy differences, have agreed to live separately and apart from each other during the remainder of their lives;" and contains the covenants usual in instruments of this kind, on the part of the husband, with the trustee, that the wife may live separately, at such places and with such families, relatives or friends, as she may think proper, without molestation or hindrance by him; and a covenant for the payment to the wife, or to the trustee for her, during her life, of an annuity of \$3,000, in equal monthly instalments. To secure the payment of this annuity, William Stout, by the deed, conveyed to the trustee certain premises situated in the city of San Francisco, upon the trust that the trustee should permit William Stout to receive the rents and profits until default be made by him in the payment of the annuity, or some part thereof; but in case of default in such payment for the space of fifteen days, then, upon the trust, to raise out of the rents and profits the annuity, or so much thereof as might be in arrear, in addition to the expenses, and to apply the same as Mary Stout might in writing direct, or for want of such direction, to Mary herself, for her sole and separate use and maintenance, with a proviso, that for any sum which the husband or his representatives might be compelled to pay for her, a deduction should be made from the first instalments of the annuity. In consideration of the premises, the

trustee on his part covenants with William Stout to indemnify him against all debts of his wife, for maintenance or other account, whilst she lives separate and apart from him, and enjoys the annuity. Upon the execution of this deed, William and Mary Stout separated, and have ever since lived separately, and he has never been required to pay any debts contracted by her, or any expenses incurred on her account.

In April, 1851, Green, the trustee, left California, and his residence was unknown for several years. In October, 1851, Mrs. Stout, not having received any payments on account of her annuity, commenced the present suit. Objection being made to the suit, in the name of Green, on petition to the Court, the present plaintiff was appointed trustee in his place.

On the nineteenth of April, 1850, judgment by confession was rendered in the District Court of San Francisco county, in favor of the defendant, Jacob M. Stout, against his brother, William Stout, for a sum exceeding nineteen thousand dollars, but was not signed by the District Judge until June 8, 1850.

The record in the District Court alleges that the debt for which the judgment was confessed existed April 1, 1850. It does not show that it was contracted previous to that date. Upon this judgment, execution was issued April 26, 1850, and the premises included in the deed of separation were sold under it on the twenty-seventh day of May, 1850, and bid in by the defendant Jacob M. Stout, to whom a conveyance was made by the sheriff.

The defendants, who answered in the suit, and resist the relief sought by the plaintiff, derive their title to the premises in question under this sale and conveyance by the sheriff. Judgment by default passed against several of the defendants, and among the number, against the defendant William Stout.

There is some hearsay testimony in the record that Mrs. Stout had a child in the summer of 1852, and it does not appear that her husband was absent from the State after the execution of the deed, but the same testimony which states the birth of the child gives the name of its reputed father.

A notice of *lis pendens* was filed in the recorder's office of San Francisco in May, 1854, and the present holders of the premises described in the deed of separation purchased with notice of this suit.

After a protracted litigation, the plaintiff obtained a judgment against William Stout for the arrears of the annuity, and for the possession of the premises, with authority to collect the rents until they amount to a sum sufficient to pay the judgment, with accruing monthly payments of \$250 during the joint lives of William and Mary Stout, besides the taxes and necessary expenses.

From the judgment the defendants appealed.

*H. P. Hepburn* for Appellants.

I. It is admitted that deeds of separation have been tolerated in England, where ante-nuptial settlements are so common that contracts like the present have been unwittingly sustained by the Courts, to the regret of later and wiser Judges, as will be seen in the opinion of Lord Eldon, in the great case of *St. John v. St. John*, 11 Vesey, 526; reiterated in *Westmeath v. Westmeath*, 5 Bligh R., N. S., 356; S. C., 1 Dow & Clarke, R., 519. In this case Lord Eldon not only expressed his regrets at the past decisions on the subject, but entertained doubts whether they should be concurred in. We beg to call especial attention to Atherly on Marriage Settlements, 385, Law Library, vol. 27, p. 200, note 1. The opinion of Lord Eldon is there criticised with great acumen and force, and the conclusion is irresistibly drawn that Eldon condemned such contracts, even when made through the intervention of a trustee covenanting with the husband, as void, notwithstanding the previous decisions. Out of respect, however, to them, he sent the case to the House of Lords, in order to have the question settled by that high tribunal. Speaking of his dissent from the very doctrine contended for by the plaintiff in this case, he says:

"This doubt has long had place in my mind. If this were *res integra*, untouched by doctrine or decision, I would not permit such a covenant to be the foundation of an action or suit in this Court, but if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I can not, upon any doubt of mine as to what ought to have been originally the decision, shake what is the settled law upon the subject. It is better that the case should go the House of Lords than that the law should remain in this state, upon a point connected with the well-being of society."

The American cases upon this subject are very few, being but seven in number, as quoted by plaintiff's counsel, and referred to in the text-books, from which the doctrine of the plaintiff is drawn, and we have been able to find none others.

We unhesitatingly say, after a very careful examination of all the American cases, that there is but one in which a deed of separation has been enforced directly. That is the case of *Read v. Beazley*, 1 Blackford, 97, and in that case the Court relies solely on the course of the English decisions, and says that in England it has been thought better to let parties separate if they can not live together; hence the policy of the law in England on this subject. It will be shown hereafter that the policy of the law here is different, on account of a difference in the state of society, and the law of divorce.

We will now analyze the other American cases. The case in 3 Paige, 500, is a case where the wife releases her dower by the articles of separation. The husband, by his will, bequeathed her a certain sum for the release of her dower. The Court con-

strued the provisions made in his will to be a bounty on his part, and a sum in addition to that allowed by the articles of separation, and allowed her to take both in lieu of dower.

The case in 4 Paige, 516, is this: The wife asks the Court for an allowance pending her suit for a divorce; the husband replies that he had made her a separate allowance. But the Court says that the separate allowance and agreement to separate are void, being made without the intervention of a trustee, and grants her the allowance asked for, saying, incidentally, that the articles of separation might have been good if made through the interposition of a trustee. The articles in the case of 4 Dana, 141, were made without trustees. The Court declares them void, but held that if trustees had intervened they would have been valid.

In the case in 14 Smedes & Marshall, 59, the agreement of separation was verbal. The Court says that, without deciding the question whether a verbal agreement of the sort is valid, this agreement, being made without trustees, is void.

In the case in 3 Barr, Hutton v. Duiz, the wife seeks to repudiate the articles after the death of her husband, and acquiescence on her part in them, and the receipt of the sum secured by them. Her claim to her share of the husband's estate was relinquished by her in the articles. The Court considered them consummated by the death of the husband, and held her bound by them.

The articles were made without the interposition of trustees, and were conceded to have been void during the life of the parties; so that the validity of the articles was not in question.

In *Battle v. Wilson*, 14 Ohio, 257, the suit was upon a bond of the husband to third parties for the use of the wife. The bond is set forth in the case, and did not contain one word about separation.

Thus it will be seen that in all the American cases but one, these settlements have been introduced collaterally, or have been approved of in *dicta*, not being the subjects of the controversy at all, or they have been treated as consummated contracts after the death of one of the parties.

The smallness of the number of American cases on this subject is, no doubt, owing to the difference between the condition of society here and in England.

In this country, we are not habituated to marriage settlements of any kind, ante-nuptial or post-nuptial; but in England, among the wealthy classes, marriages have been greatly influenced by pecuniary considerations, or, at least, have been attended with settlements so much as a matter of course, that at last it has been looked upon as a tie, which, as it has been commenced by settlement, may be suspended by the same means. At the same time, the law of divorce in England encourages such contracts as this. There, a divorce *a vinculo* can not be obtained except for

such a cause existing before marriage, as, according to the ecclesiastical law, would make the marriage a nullity.

For causes arising subsequently to marriage, a divorce *a mensa et thoro* alone was granted. See Bl. Comm., 1, 440.

The consequence is, as the parties could not procure any greater relief in such cases, by an application to the Court than by their private agreement, they resorted to these settlements, and the Courts, considering that they avoided the scandal of an application to the Courts, and produced the same practical results as a divorce *a mensa et thoro*, have on this account, and this alone, felt inclined to sustain these arrangements. But in the United States generally, and especially in this State, divorce *a vinculo* is granted for causes arising after marriage; and in the most of the cases in which articles of separation would be resorted to in England, a divorce *a vinculo* can be obtained here through the Courts. Hence the rareness of cases based on articles of separation arising in the Courts in this country.

The policy of the American Legislature on divorce is adverse to articles of separation, and the converse of the reasoning which may induce the Courts in England to favor them, should cause the American Courts to look upon them with disfavor.

The Supreme Court of this State has laid down the doctrine, in *Abel v. Caldwelwood*, 4 Cal. R., 90, that in cases where the law has been departed from in decisions in other States and in England, that in this new State, when uncontrolled by decisions here, we should hold to the law, notwithstanding the precedents elsewhere to the contrary.

It would be difficult to conceive a case in which this doctrine could be applied so properly as to the present one.

II. The contract is not to be adjudged by the rules of the common law, but by those of the civil law.

It was entered into on the sixteenth day of February, 1850, a time when all contracts in this State were regulated and governed by the civil law. See *Smith v. Fowler*, 2 Cal. R., 569.

Such a person as a trustee is unknown to the civil law, as was admitted in the argument by the counsel of the plaintiff.

The consequence is, that all the decisions which have unguardedly allowed such transactions to be sustained, through the technical interposition of a trustee, lose all force as precedents, and the case is, therefore, such a case as one at common law would be where a trustee had not been interposed, and the Court is left untrammelled by the authorities which have, on purely technical grounds, sustained a contract which, without such technicality, would be at once condemned as immoral and destructive of the very foundation of society.

That such a contract at common law would not be sustained, even in England, without the intervention of a trustee, is a proposition that cannot be disputed.

This contract cannot be sustained at the civil law, and, as we have been informed by gentlemen who have practiced extensively under that law, no lawyer would pretend to assert a claim under such a contract in a civil law Court.

The dominion of the husband over the person of the wife at the civil law, is absolute, and she is obliged to follow him wherever he may go, and they cannot by their agreements derogate from the power of the husband over the person of the wife. Code of Louisiana, Art. 2307; Code Napoleon, Art. 1388.

In 14 Merlin, title 5, § 25, "of the contract of marriage," the doctrine of the civil law is laid down, as follows:

"There can be no derogation from the power of the husband over the person of his wife; so that the agreement by which the wife would be authorized, in case of incompatibility of temper, to live separate from her husband, or the husband to live separate from his wife, would be null, and of no effect."

In Escheriche, title "Donation among the Spouses," the law is laid down thus:

"That which one of the spouses makes to the other during the marriage is prohibited. This kind of donation is null:

"1. It is not decorous that the affection which ought to unite mutually the hearts of the husband and wife should be venal, and could be gained or preserved by presents.

"2. Because otherwise it would happen many times that the excessive love of one of the spouses might cause him to despoil himself of his property in favor of the other.

"3. Because by importunities and differences which might be excited continually, the one could oblige the other to buy peace and domestic repose at the cost of his property.

"4. Because the resistance which one might make to the donation that the other might seek, would give rise to frequent divorces and separations."

In Merlin, vol. 19, p. 337, Art. Mari., the following case is given:

"Mr. Danbrenez, domiciled at Brussels, agreed to pay his wife yearly, during all the time his absence would last, the sum of 2,000 florins for her maintenance, that of her daughter, and the expenses of the establishment. In default of payment Madame D. sues her husband. The Court of Appeals at Brussels, considering that the agreement has all the appearance of an act of voluntary separation, declares that she has no right of action."

III. The articles have not been executed on the part of the trustee, and therefore cannot be enforced. The trust was not accepted.

The mere signing of the trustee did not bind him, for it was evident that he conceived something further was to be done by him in order to consummate the obligation on his part; before that has been accomplished his mind receives a new impression,

by which the intention which he had of binding himself is completely altered, and he never does the act which he conceives is necessary to bind him. 10 Mass. R., 458; 20 Pick. R., 28; 4 Cushing, 285; 30 Me., 110; 1 Halsted Ch. R., 430, 452; 2 Stoddard's Eq. R., 370; 3 Met., 275.

The mere signing is an act which he may revoke, as no one is prejudiced by it, being done whilst the party signing was alone, and he under no obligations whatever to sign.

There must be shown on the part of Green an intention to be bound, consummated by some final act.

In this case there is no pretence that the signing of Green caused the husband and wife to act on the articles. There must be, therefore, shown a voluntary and completed assumption of the obligation of the covenant on his part.

It is to be observed that our title is under a judgment and execution-sale against the husband. Our position is, therefore, such, that unless the husband has been indemnified against his wife's debts, by the executed covenant of the trustee in the article, they can have no validity whatsoever against us. The law upon this point is laid down in *Atherly on Marriage Settlements*, 379, (Law Library 27, p. 197,) in these words:

"But it may be asked, will such a settlement be good where the husband is not indemnified? The decision in the case of *Fitzer v. Fitzer*, is a complete answer in the negative. And the decision in this case may be considered as the stronger, from the circumstance of the debt, which was owing to the creditor who impeached the settlement, having arisen subsequent to the settlement. Lord Hardwicke, in fact, seemed to consider every settlement, by way of separate maintenance, as void against creditors in case the husband had no indemnity against his wife's debts, on the ground, that a man is bound by law to provide for his wife. His Lordship looked upon such settlement as a settlement for the husband's own benefit, and, consequently, as falling within the act of the 13 Eliz."

In *Atherly on Marriage Settlements*, it is laid down as law, that settlements, upon separation, are viewed with great suspicion as against creditors, where they are disproportioned to the husband's means, or are soon followed by his bankruptcy, and often, under such circumstances, declared fraudulent against creditors.

IV. The judgment of April 19, 1850, was regularly entered. The issuance of the execution before the judgment was signed by the District Judge, was a mere irregularity, for which the validity of the sale made and deed given by the sheriff can not be attacked collaterally.

V. The deed of separation was not duly registered. The record in the alcalde's office did not impart notice to the purchasers at the sheriff's sale.

VI. If it should be held that the deed of separation was valid, and that the trust had been accepted, still the wife has no claim to the annuity, because the parties afterwards came together and were reconciled.

In 2 Story's Equity, § 1428, the learned Commentator says: "In the next place, even in case of a deed for an immediate separation, if the parties come together again, there is an end to it with respect to any future as well as to the past separation." And cites numerous authorities in support of this doctrine.

It is in evidence, that Mrs. Stout, in the summer of 1852, had a child while living with her sister at San Luis Obispo, in this State. There is no proof that her husband was out of the State. On the contrary, the witnesses all speak of him as living in this State, and he is believed to have lived here continuously until the present moment.

We contend that the parties must be presumed to have come together. The law presumes access of the husband in case of the birth of a child, unless it be shown that access is impossible, or the presumption of access, (which has been laid down in all the law books as a very strong presumption,) is rebutted by evidence which outweighs. 1 Black. Com., 457.

*Fletcher M. Haight and Joseph G. Baldwin for Respondent.*

1. A deed of separation acted upon will be upheld without any trustee. See Hill on Trustees, 426, and authorities cited; 2 Roper's Husband and Wife, 292.

No covenant is necessary to support the deed against the husband himself. A deed of separation usually contains a covenant by trustees to indemnify the husband against support of wife, but the absence of such a covenant on the part of the trustees will not invalidate the deed, but it is binding on the husband himself, although for the want of a proper consideration it would not hold good against existing creditors. Hill on Trustees, 426, authorities cited; 2 Atkyns, 511; Frampton v. Frampton, 4 Beven, 287; Read v. Beagley, 1 Blackford, 98; Ross v. Willoughby, 10 Price, 2; Clough v. Lambert, 10 S. 174, E. C. R., vol. 16. Claims of creditors do not intervene; appellants are neither creditors nor representatives of creditors. If they were, it would not aid, as the deed of separation was made before any debt to Jacob W. Stout. The debt is stated in the declaration, and we have no evidence of its originating earlier than April 1, 1850. Deed, February preceding. Jacob W. Stout was a brother of William Stout, and a subscribing witness to the deed of separation. Green did assent and exercise the trust, and executed the covenant on his part.

"A trustee can not defeat a trust-deed by refusing to accept the trust, and, if necessary, the Court will appoint a trustee in his place." Dawson v. Dawson, Rice Ch. Reports, 152.

"The absence of a trustee in a deed of trust, is not necessary to sustain the trust, and if he refuse to accept the trust, chancery will execute it." *Field v. Arrowsmith*, 3 Hump., 442.

No formal acceptance on the part of the trustee named in the trust-deed is necessary to pass the title. *Bixler v. Taylor*, 3 B. Monroe, 362; *Picket v. Johns*, 1 Dev. Ch., 123.

2. A deed signed, sealed, delivered, and acknowledged, which is committed to a third person as the deed of the grantor, to be delivered over to the grantee on a future event, is the deed of the grantor, presently. *Wheelright v. Wheelright*, 2 Miss., 447; *Hatch v. Hatch*, 9 Miss., 309; 3 Met., 412.

A deed may be delivered as such without any act of delivery. *Mills v. Gore*, 20 Pick., 28, 36.

It is not necessary to the validity of a deed conveying land in trust, that the *cestui que trust* should execute it, or express an assent to it. His assent will be presumed until the contrary is shown. *Wiscrall v. Ross*, 4 Porter, 321, and cases. Nor is it necessary that the trustee should sign it. *De Woods v. Holland*, 1 St. & Porter, 9; *Belden v. Carter*, 4 Day, 66; *Ruggles v. Lawson*, 13 Johns., 285.

3. A deed of separation, through the intervention of a trustee, is valid and binding, and may be enforced in chancery, in respect to all collateral covenants. *Carson v. Murray*, 3 Paige, 500; opinion of Walworth, Chancellor.

This matter is fully discussed in Bright's Husband and Wife, vol. 2, p. 305, book 4, chap. 1. An agreement between husband and wife, without the intervention of a trustee, can not be enforced; though where the agreement has been acted upon it has been upheld. 4 Paige, *Rogers v. Rogers*, 516; *Hutton v. Day*, 2 Barr, 100, for a case where an agreement for an immediate separation, acted upon, was supported. *Hill on Trustees*, 425; ed. by Wharton, and note of the American editor.

The American authorities seem also to maintain the principle that a deed providing for a future separation is not valid, though cases are to be found in which this exception was disregarded. The principle is undeniable, that in a deed of separation by a trustee on the part of the wife, an immediate separation is contemplated, and if it actually takes place, all the covenants in the deed providing for the support and alimony of the wife will be maintained. They are good at law; much more are they available upon the doctrines of equitable jurisprudence. 2 Story's Equity, §§ 1427-8; *Simson v. Simson*, 4 Dana, 141. Since writing the above, the case of *Wilson v. Wilson*, 14 Simon's Rep., in 37th vol. of English Chan. Rep., 405, contains the whole of the law, and review of all the cases. See 14 Ohio Rep., 257; 3 Barr, 100; 8 Georgia, 341.

In *Hill on Trustees*, marginal page 428, the author says:

"And where the wife is entitled to a provision by virtue of a contract, whether contained in marriage articles, or in a covenant, or deed of settlement, it is clearly settled that the trust may be enforced in her favor, notwithstanding her adultery, although she may be living apart from her husband; and a suit by the trustees against the husband, for that purpose, may be sustained."

To these propositions the author cites *Sidney v. Sidney*, 3 Peere Wm., 270; *Blout v. Winter*, *ibid.*, 270; *Moore v. Moore*, 1 Ark., 286; *Seagrave v. Seagrave*, 13 Vesey, 439. Bright's Husband and Wife, vol. 2, p. 87, and following §10, sums up the principle as laid down by Roper in his treatise: "That the wife's elopement only, or her elopement and adultery, do not deprive her of the power of enforcing any of her legal or equitable rights, with the exception of her 'right to dower.' The right to dower is forfeited by statute." On this see same author, on page 350, §10. At common law, adultery did not prevent the wife from enforcing her civil claims; and before the statute of Westminster 2d, she was entitled to dower, and the exception of it, by a particular provision, proves that in other cases adultery was no bar to the wife enforcing any of her rights in Courts of Justice.

4. The next point of objection is, that, by the Mexican law in force at the date of this contract, it was a nullity; and it is assumed that upon this subject the Mexican law is the same as the civil law of Spain and France. What the Mexican law, as applied to California was, at the time of the execution of this contract, there is no evidence in the case, or in the brief of our opponents. On this point we answer:

Admitting the law of Spain governs, it is in substance the common law, and to be administered by Ecclesiastical Courts. Civil Laws of Spain and Mexico, by Schmidt, p. 10; 1 White, 44. Separation from bed and board might be in an ecclesiastical forum, but not by consent of parties. Such is the English law, or at least the doubt has been whether articles of separation will be enforced to compel a separation in fact, though all collateral engagements might. A separation is not lawful, in the strict sense of the term, now in England, unless by a decree of Consistorial Court. Separation from bed and board, to have all its legal attributes, must be by the consistorial, which answers to the Spanish Ecclesiastical Court.

All this does not begin to prove that even under the civil law the husband might not be bound to pay an annuity, in consideration of being indemnified against the support and debts of the wife. In the case cited from Merlin there was no consideration. It was a mere engagement between husband and wife, without consideration, and void under any system of law, as an executory agreement. To make a valid agreement, consideration is as necessary under the civil as the common law.

The subject of donations *inter vivos* has no application to this

matter. We do not claim under a donation, but a contract. For this matter, see same author as above cited, p. 255, Schmidt Civil Laws of Spain; White, vol. 1, p. 56, and following.

5. We come now to the defendants' case. They claim under a judgment and execution against William Stout, rendered nineteenth April, 1850. The origin of the debt, as appears on the record, is subsequent to the deed of separation. The debt did not exist at date of deed. As against this judgment being for a debt subsequent to the deed, the provision for the wife was not fraudulent. Whatever may be the English decisions in former times, under our statute, as now expounded, a provision for wife or family is valid against subsequent creditors. The only test is, was the husband solvent when he made the deed.

But as defendants claim under judgment, execution, sheriff's sale, and deeds duly registered, it becomes necessary to see whether these proceedings were effectual to pass any title in William Stout. To these proceedings there are several objections. Laws of 1850, p. 443.

*First*—There was no judgment until the record was signed by the Judge, which might be done after four days. No execution could issue until after judgment signed; judgment seems to be entered nineteenth of April, but not signed until eighth of June, 1850. Execution issued twenty-sixth of April, 1850—of course, before it could issue—it was, therefore, a nullity.

*Second*—The sale took place twenty-seventh of May, before any judgment was signed, and before any execution could issue. The whole proceeding is a nullity. It is not a case of mere irregularity; the proceeding was null and void. Common law was introduced nineteenth of April, 1850. By the common law no execution could issue until judgment signed. *Barrie v. Dana*, 20 John., 307. See authorities as to common law of England, by Kirkland, *arguendo*. If issued before judgment signed, execution is a nullity. Practice Act was passed April 22d, 1850. The enactment requiring a record to be signed before execution, was according to the practice at common law; but we are not left here. The act entitled "An Act to organize the District Courts of the State of California," was passed March 16th, 1850; and by the thirty-first section of that act (page 96 of Laws of 1850,) no process could issue on judgment until the record was signed. Until signed it was of no validity, and the omission to sign was not amendable. See *Butler v. Lewis*, 10 Wendell's Rep., 542. The Court say, as to a judgment not signed, it was mere blank paper, so far as the judgment was concerned.

The execution was issued after the passage of the Practice Act. The judgment and execution were after the act of sixteenth of March, 1850. The sale was the twenty-seventh of May, before any judgment, it not being signed until eighth of June. The execution was void.

6. The point is made that Mrs. Stout, having had a child after the separation, and while living apart from her husband, is evidence of a reconciliation, which will avoid the deed of separation. A class of authorities are invoked on this point relating to the legitimacy of a child claiming as heir, and the strong legal presumption which obtains in that case in favor of legitimacy, is sought to be applied to the case at bar. On this subject it may be well to inquire what this reconciliation is, which avoids the deed, and the reason why it does so? In *Bright's Husband and Wife*, p. 349, it is said: "If after separation the husband and wife be reconciled and live together, that circumstance will avoid the deed or articles." In the case at bar, the evidence is, and such is the finding of the Court, that they continued to live separately, and had never lived together since the deed of separation. The reason of the principle is this, that the object, nature, and consideration of the deed is to provide a maintenance for the wife while living separately from the husband, but if they are reconciled, and live together without any new arrangement, the husband being bound under such circumstances to provide for the wife, and the law compelling him so to do, the consideration of the deed of separation fails—its object is at an end, and the former relations between the parties are resumed.

It is obvious that, upon principle, the reconciliation, to avoid a deed of separation, must be a permanent reconciliation, and a living together in the restored relation of husband and wife. Even a casual intercourse, and repeated declarations of a desire to return to their former state, will not answer. The case of *Hyer v. Burger*, 1 Hoffman's Chan. Rep., p. 1, is an illustration of the principle.

The only testimony on this subject was that of one witness, who stated that in November, A. D. 1852, he returned here from the Atlantic States, and then heard that Mrs. Stout had a child during that summer. She was living at San Luis Obispo with her brother, at the time. The witness also gave the name of the reputed father of the child.

Now, the complaint was filed on the twenty-fourth of October, A. D. 1851. On the twenty-seventh of December, A. D. 1852, a decree *pro confesso* was taken against William Stout.

The answer of such of the defendants as answered, was filed on the fourteenth of July, A. D. 1854.

The answer does not pretend to set up the fact of reconciliation in avoidance of the deed, (even if the defendants could set up this defence in the face of the implied recognition of the deed by William Stout, the only party who stands in such a position as to enable him to contest it on this ground.)

The rule invoked, and the authorities cited, apply only to cases of heirship. They have no application to the relations of the parties. It is a peculiar rule made by the law, in order to save

the opprobrium and disgrace of bastardy, and to supply the great deficiency of proof in regard to legitimacy.

FIELD, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

To the judgment, the appellants urge various objections: *first*, the impolicy of upholding voluntary separations between husband and wife; *second*, the illegality of the contract under the civil law; *third*, the invalidity of the trust for want of acceptance by the trustee; *fourth*, title in the defendants, or those under whom they hold by virtue of the sale and judgment of April, 1850; *fifth*, want of registration of the deed, and consequent absence of notice to the purchasers under the sheriff's sale; and *sixth*, subsequent reconciliation and cohabitation between the husband and wife.

It is admitted by the counsel of the appellants that deeds of separation between husband and wife have been upheld by the Courts of Chancery in England, but it is insisted that this has been done with expressions of regret by the later Judges that they have felt themselves bound by previous adjudications, as otherwise they would not have hesitated to pronounce such agreements void as against the policy of the law. Our attention is particularly called to the observations of Lord Eldon, in the celebrated case of Lord St. John v. Lady St. John. (11 Vesey, 526.) In that case Lord Eldon doubted whether such agreements could be the foundation of either action or specific performance, and said: "That doubt has long had place in my mind. If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit in this Court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject." The same opinion was reiterated by the Chancellor several years afterwards, in the case of The Earl of Westmeath v. The Countess of Westmeath. Previous to the decision in Lord St. John v. Lady St. John, agreements of this kind, made through the intervention of a trustee, were upheld in a great variety of cases, and notwithstanding the observations of Eldon, the law seems to have undergone no change. Indeed, it is settled by an unbroken series of decisions, from Seeling v. Crawley, decided by the Master of the Rolls in 1700, (2 Vernon, 385,) to Wilson v. Wilson, decided by the Vice-Chancellor in 1845, (14 Simons, 405,) that agreements of this nature are valid, and not liable to the objection that they are against sound principles of policy.

Those who feel an interest in the investigation of the subject will find a citation of the English authorities in the opinion of

the Vice-Chancellor in *Wilson v. Wilson*, and will find it difficult, after their examination, to dissent from his judgment "that the matter is concluded by authority."

And the law in the United States is equally well settled as in England, as will appear by reference to some of the principal cases in which the question has arisen. In *Carson v. Murray*, (3 Paige, 483,) Chancellor Walworth said :

"It has, however, long since become the settled law in England, that a valid agreement for an immediate separation between a husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee; and, as many of the decisions which have gone the greatest length on this subject took place previous to the Revolution, they have been recognized here as settling the law in this State (New York) to the same extent."

In *Nichols v. Palmer*, (5 Day, 47,) the Supreme Court of Connecticut held such agreements valid, and Smith, J., in his opinion in the case, said: "Contracts between the husband and some third person, for the separate maintenance of the wife, have the uniform sanction of the Courts, in *England*, from the earliest period of their jurisprudence, and is a part of the ancient common law. In this country, it is believed, that our ancestors have been in the habit of making similar arrangements, from the first settlement of the country; and many exist at this time, in various parts of the State, which have been made in pursuance of this usage. Such being the common law of *England* at the time our ancestors emigrated from that country, and such having been the usage in this country ever since, it ought now to be binding on our Courts as the common law of the land."

In *Hutton v. Day*, (3 Barr, Penn., 100,) the article of agreement was entered into without the intervention of a trustee, and the wife, after the death of her husband, sought to invalidate it, and recover the portion of his estate which she had relinquished by the article; but the Supreme Court of Pennsylvania upheld the contract as having been consummated, and in its opinion, said :

"Deeds for the separation of husband and wife are valid and effectual, both at law and in equity, provided their object be actual and immediate, and not a contingent or future separation. This distinction runs through all the cases, and, although the wisest Judges have frequently asserted that deeds of separation are at variance with the policy of the law, it is now too firmly settled to be shaken. The agreement here contemplates an immediate separation; it was carried into effect in good faith by the husband; has nothing unreasonable in it; and, consequently, the wife, after the death of the husband, is not entitled to the aid of the Court in any attempt to violate it."

In *Battle v. Wilson*, (14 Ohio, 257,) the Supreme Court of Ohio held that articles of separation, through the medium of a trustee,

where the separation takes place, are not void, as against public policy.

In *Chapman v. Gray*, (8 Geo., 341,) the Supreme Court of Georgia, after an extended consideration of the English and American cases, sustained the validity of an agreement of separation. Mr. Justice Lumpkin, in delivering the opinion of the Court, expressed doubts as to the policy and morality of voluntary separations, but considered the law on the subject too well settled to be departed from.

In *Reed v. Beazley*, (1 Blackford, 97,) the Supreme Court of Indiana upheld the agreement, and to the objection that the contract was void, as against the policy of the law, said: "that contracts of this nature are supported by a long train of *English decisions*; and we are satisfied that it comports with good policy to act in conformity with those decisions. How much soever we may regret the unhappy state of society that renders articles of this nature necessary, we see no reason to regret that such contracts, so far as they provide for the maintenance of the wife, are considered obligatory."

From these authorities, and others to the same effect might be cited, it is clear that, by the settled law in the United States, such agreements are not invalid, because against sound principles of policy, and are upheld and enforced, when entered into through the intervention of a trustee, if followed by immediate separation, or, if separation has previously taken place.

The second objection urged upon our attention, is the illegality of the contract under the civil law. The deed was executed on the sixteenth of February, 1850. The common law, as a rule of decision, was not adopted until April 13, 1850, and by an act passed April 22, 1850, all laws in force in this State, except those passed at the first session of the Legislature, were repealed, with a proviso that all rights acquired, *contracts made*, or suits pending, should not be affected thereby. It is contended, therefore, that the validity of the agreement in suit must be determined by the civil law in force in California at the date of its execution, and that by the civil law it is a nullity.

The briefs of counsel are exceedingly barren of references to authorities as to the Mexican civil law, and furnish little aid to the Court in its investigation. It is true that the Court is bound to take judicial notice of the general laws *in force* in this State at the cession of California which remained unrepealed until the act of April, 1850. Those laws are not regarded as foreign, so as to require proof of their existence, and counsel seem to have contented themselves with this circumstance and general assertions as to their character, with few citations of text-books or judicial decisions.

In 14 *Merlin*, title 5, § 25, "of the contract of marriage," the doctrine of the civil law is laid down as follows:

“There can be no derogation from the power of the husband over the person of his wife. So that the agreement by which the wife would be authorized, in case of incompatibility of temper, to live separate from her husband, or the husband to live separate from his wife, would be null, and of no effect.”

The nullity of the agreement for separation may be admitted, and the conclusion does not follow that the husband may not be bound to pay an annuity in consideration of being indemnified against the support and debts of his wife. The covenants for separation will not be enforced, either in the English or American Courts, and yet full force is given to the collateral covenants of the husband and trustee. (2 Story's Equity, § 1428.) So, in the civil law, contracts by the husband for the maintenance of the wife will be upheld like any other contracts, if made upon sufficient consideration, between parties capable of contracting.

In *Labbe's Heirs v. Abbot et al.*, (2 La., 554,) the validity of an agreement between husband and wife for a division of the common property upon a voluntary separation was upheld. In that case, it appeared that in 1781 the parties entered into a marriage contract, by which they formed a community of property. Upon this contract they were married, and lived together until 1805, “when they entered into a voluntary agreement to separate, and to live separate, both in person and property.” The act of separation was drawn up, and signed by the parties, and acknowledged before an officer exercising at the time the functions of judge and notary. The common property was then divided, and from that time until the death of the wife, the parties lived separately, and used and enjoyed separately the property assigned to them respectively. On the death of the wife, her heirs brought suit against the husband for an account, alleging that the community of property never ceased to exist between the husband and wife, notwithstanding they lived separately, and had divided their property at the separation; and the principal question of law raised in the case was, whether the act of separation of goods, and dissolution of the community, was valid and binding on the parties in any respect, according to the laws in force in the country at the time of its execution. On the argument, it was urged by the plaintiffs, that a voluntary separation of husband and wife was not permitted by the Spanish laws, and such separation did not put an end to the community of property; but the Court, in deciding the case, said:

“For a solution of the first two of these questions, we must resort to the Spanish laws, which afford the only *legitimate* rules by which the acts of the parties are to be construed. According to these laws, it is clear that husband and wife were considered so far separate persons, that they could validly enter into any onerous contracts between themselves. A sale is the example given to illustrate this doctrine. They seem to have been pro-

hibited only from making donations to each other, during the marriage, of property actually in possession. \* \* The contract by which Descurs and his wife agreed, in 1805, to a separation of property, and dissolution of the matrimonial community which had previously existed between them, may be considered as partaking strongly of a contract of exchange, by which each one of the parties gave up his common right or claim to all the property, in consideration of his having obtained a separate and distinct title to a part. It was, strictly speaking, a partition of common property, and can not be assimilated to a donation. It is well known, that contracts of exchange, and agreements to divide a common property, create many obligations between the parties to such contracts, very similar to those which arise out of the contract of sale. We, therefore, conclude that the contract of 1805, did operate a good and valid separation of goods between the contracting parties, and dissolution of the community which previously subsisted between them, and a consequent mutual renunciation of any community of acquets and gains which may have been acquired subsequent to that period, by the parties to the contract. It can not be considered as having produced a legal separation, *a mensa et thoro*. The husband would probably have been obliged to provide for the maintenance of his wife, or to have afforded her bed and board, had she required it at his hands. It is true, the testimony shows that, after the execution of this contract, a voluntary separation of persons took place between the parties; but we have no evidence of any violence, or actual constraint, exercised by the husband or his wife." \* \* "*Having been made by parties capable of contracting, and by mutual consent, it should be held as valid, in toto, unless some of its provisions contained stipulations reprobated by law.*"

We can see no distinction in principle between this case and the one at bar. The collateral contract, made with a view to carry into effect a previous agreement to live separately, is upheld, because made by parties capable of contracting, and upon a valid consideration. In the present case, there is sufficient consideration in the covenant of indemnity, on the part of the trustee, against the debts of the wife, to uphold the covenants and conveyance by her husband.

Such a person as a trustee is unknown to the civil law, and contracts termed *onerous*, such as contracts of sale, exchange, and lease, can be made directly between husband and wife, and of course between husband and a third party. So far, then, as the collateral undertakings are concerned, we do not find anything in the civil law which would invalidate them and prevent their enforcement.

This disposition of the objection renders it unnecessary to consider the very interesting question, how far the civil law can be deemed to have been in force after the treaty of Guadalupe Hi-

dalgo, under the very peculiar and unprecedented condition of California at the time.

The third objection urged for a reversal of the decree is, the invalidity of the trust for want of acceptance by the trustee. The deed was delivered to the trustee, and by him signed, and subsequently left in the possession of his counsel, without any direction as to its disposition. Some weeks afterwards, the deed was placed on record, and subsequently the trustee informed an applicant for a lease of the premises that they were held by him, in trust, for Mrs. Stout. His execution and detention of the instrument, taken in connection with the fact of his previous agreement to accept the trust, and his subsequent declarations, leave no doubt of the acceptance by him. The husband and wife both immediately acted upon the deed. They lived separately, and no complaint is made by the husband of any expenses having been incurred by his wife for which he has been charged. He was personally served with process in this suit, and allowed judgment by default to pass against him.

The defendants who answered the complaint, claim the premises under the sale made upon the execution issued on the judgment against William Stout. There is no evidence that the debt for which this judgment was confessed existed previous to the first of April, 1850. The statute in relation to fraudulent conveyances was not passed until April 19th, 1850, and neither by the civil law or the statute of this state is the provision for the wife fraudulent as against the judgment-creditor, the judgment having been confessed for a debt contracted subsequent to the execution of the deed. Under the statute, and by the civil law, a conveyance for family or wife is valid as against subsequent creditors, provided the husband is solvent at the time. In the present case, no question is raised as to the solvency of William Stout at the date of the deed.

It is unnecessary to consider the objection that there was no such registration of the deed as imparted notice to the purchaser at the sheriff's sale, and those who claim under him, as no title passed by that sale. The judgment, though rendered on the 19th of April, 1850, was not signed by the District Judge until June 8, 1850.

By the act to organize the District Courts, passed March 16, 1850, no process or execution could issue upon any judgment or decree of the Court until signed by the Judge. The thirty-first section of the act reads as follows: "It shall be the duty of the clerk of the District Court to draw up each day's proceedings at full length, and the same shall be publicly read in open Court, and corrected when necessary; after which they shall be signed by the Judge thereof, *and no process or execution shall issue on any judgment or decree of the Court until it has been so read and signed.*" The execution upon which the sale was made, issued April 26.

1850, and the sale was made May 27, 1850, both before the judgment was signed. The whole proceeding was null and void. (*Bairre v. Dana*, 20 John., 307; *Burrill's Prac.*, 243.) In New York a statute (2 R. S., 360, § 11,) provided that no judgment should be deemed valid so as to authorize any proceedings thereon until the record was signed and filed; and in *Butler v. Lewis*, (10 Wend., 544,) a record not signed by the proper officer was set aside, and a motion to allow the record to be signed *nunc pro tunc* was refused. In the opinion given upon the decision of the case, Mr. Justice Nelson said:

"The record in this case has no more validity than if the attorney had filed it when it came from the hands of his clerk; it is mere blank paper, so far as the judgment is concerned. The release of all errors in the warrants of attorney and pleas can not cure the defect." The defendants claiming under the deed from the sheriff are chargeable with notice of the defects in the judgment. A notice of *lis pendens* was filed in the recorder's office in May, 1854, and the present holders of the premises all purchased with notice of this litigation, and voluntarily took upon themselves its risks.

The objection of subsequent reconciliation and cohabitation between the husband and wife is unsupported by the evidence in the case, and the point would not merit notice but from the fact that it was the basis of the previous decision of this Court. It is admitted that if parties, after separation, become reconciled and live together, that fact will avoid the deed. (*Bright's Husband and Wife*, 349.) The reason of the doctrine is obvious. The object of the deed is to provide for the maintenance of the wife whilst living separately from her husband; but, if reconciliation and cohabitation take place, her maintenance being obligatory upon him, the consideration of the deed fails. The argument of appellant is as follows: Mrs. Stout had a child in 1852, and there is no proof of her husband's absence from the State at any time after the execution of the deed; access must therefore be presumed; access is proof of reconciliation, and reconciliation avoids the deed. The argument assumes as a fact that Mrs. Stout gave birth to a child in 1852; but of this there is no legal evidence. The only evidence is mere hearsay, and this connects with the birth of the child the name of its reputed father. From a report of this nature no presumption of access to the husband can arise.

But assuming access to have been proved, it does not follow that it was the consequence of such a reconciliation as would avoid the deed. To effect this end, the reconciliation must be permanent, and be followed by cohabitation. It must be a reconciliation which restores the former relations of the parties. (*Hyer v. Bruger*, Hoffman Chan. Rep.)

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Whitwell v. Thomas.

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There was no cohabitation between the parties in the present case; none is pretended.

The rule as to the presumption of access, cited in the former opinion of this Court, applies only to cases affecting children, and has no application to the parties. It is a rule, founded in policy, out of tenderness to the heirs, to avoid embarrassing questions of legitimacy, and prevent confusion in determining the succession of estates.

Judgment affirmed.

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### WHITWELL v. THOMAS *et al.*

Where a complaint in an action on a promissory note executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note: *Held*, that the averment of partnership was immaterial, and that plaintiff was entitled to judgment on the pleadings.

The execution of the notes, not the copartnership of the defendants at the time, constituted the material averment.

The test of the materiality of an averment in a pleading is this: could the averment be stricken from the pleading without leaving it insufficient?

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action on a promissory note. The complaint alleges the copartnership of the defendants, and the execution by them, of the two notes in suit. The answer of the defendant, Thomas, denies the copartnership at the date of the notes, and any authority in his co-defendant to bind him as partner; but does not deny the execution of the notes by the defendants, or by himself in their name. The other defendant was not served with process and did not appear in the action. The pleadings are verified, and upon them the Court gave judgment for the plaintiff, without the introduction of any testimony.

*Foote & Wattson* for Appellant.

*Whitcomb, Pringle & Felton*, for Respondents.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The only question for consideration is, whether any material averment of the complaint is denied by the answer. The test

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Williamson v. Blattan.

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of materiality is this: Could the averment be stricken from the pleading without leaving it insufficient? (Practice Act, § 66.) Judged by this test, the averment of copartnership is immaterial. The complaint would be sufficient if this were stricken out. The execution of the notes—not the copartnership of the defendants at the time, constitutes the material averment, and this is not controverted.

Judgment affirmed.

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WILLIAMSON *et al.* v. BLATTAN *et al.*

In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking.

A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

This was an action instituted against the defendants to recover from them the sum of \$372 46. The action was brought on an undertaking executed by the defendants to release certain property, seized and held by attachment in a certain suit wherein Teal and Post were plaintiffs, and Davidson and Stevens were defendants.

The complaint alleges that Teal and Post commenced a suit in the District Court of the Fourteenth Judicial District, against Davidson and Stevens to recover the sum of \$372 46, and that to secure the payment thereof the said Teal and Post attached certain property of said Davidson and Stevens, "who, for the purpose of releasing said property from said attachment according to the statute in such case made and provided, caused to be executed a certain bond in the words and figures following." The bond is then set out at large. The complaint avers that judgment was obtained in said suit, and that execution was issued and returned unsatisfied; that said judgment is not paid, and that defendants have no visible property liable to execution; and that said undertaking has been duly assigned to plaintiffs; that plaintiffs have demanded of the defendants payment of said sum of money, and that they have failed to pay, and that the amount is now due and unpaid, etc.

To this complaint the defendants demurred, and among other grounds assigned as a ground of demurrer, "that the complaint does not state facts sufficient to constitute a cause of action."

The Court below overruled the demurrer, and gave judgment for the plaintiffs, and defendants appealed to this Court.

*Francis J. Dunn* for Appellant.

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

This is an action upon an undertaking executed to release property from an attachment. The complaint does not aver that the property attached was released upon the delivery of the undertaking. In this respect it is defective, and the defect is one which may be taken advantage of under a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action without further specification. (*Palmer v. Melvin et al.*, 6 Cal., 651; *Haire v. Baker*, 1 Selden, 357; *Johnson v. Wetmore*, 12 Barbour, 483; *Ellissen v. Halleck*, 6 Cal., 386.)

It follows that the Court erred in overruling the demurrer. Judgment reversed, and cause remanded, with leave to the plaintiffs to amend their complaint.

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Ex parte Newman.

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### EX PARTE NEWMAN.

*Per Terry, C. J.*—The Act of April, 1858, "for the better observance of the Sabbath," is in conflict with the first and fourth sections of article first of the Constitution of this State, and is therefore void.

The Constitution, when it forbids discrimination or preference in religion, does not mean merely to guarantee toleration, but religious liberty in its largest sense, and a perfect equality without distinction between religious sects. The enforced observance of a day held sacred by one of these sects, is a discrimination in favor of that sect, and a violation of the religious freedom of the others.

Considered as a municipal regulation, the Legislature has no right to forbid or enjoin the lawful pursuit of a lawful occupation on one day of the week, any more than it can forbid it altogether.

The governmental power only extends to restraining each one in the freedom of his conduct so as to secure perfect protection to all others from every species of danger to person, health, and property; that each individual shall be required so to use his own as not to inflict injury upon his neighbor; and these seem to be all the immunities which can be justly claimed by one portion of society from another, under a government of constitutional limitation.

The act in question is in intention and effect a discrimination in favor of one religious profession over all others, and as such is in violation of the Constitution.

*Per Burnett, J.*—Our constitutional theory regards all religions, *as such*, as equally entitled to protection, and equally unentitled to preference. When there is no ground or necessity upon which a principle can rest but a religious one, then the Constitution steps in and says that it shall not be enforced by authority of law.

The Sunday law violates this provision of the Constitution, because it establishes a compulsory religious observance. It violates as much the religious freedom of the Christian as of the Jew. The principle is the same, whether the act *compels* us to do what we wish to do or what we wish not to do.

If the Legislature has the power to establish a day of compulsory rest, it has the right to select the particular day.

The protection of the Constitution extends to every individual or to none. It is the individual that is intended to be protected. Every citizen has the right to vote and worship as he pleases, without having his motives impeached in any tribunal of the State. When the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything because it violates simply a religious principle or observance, the act is unconstitutional.

The constitutional question is a naked question of legislative power, and the inquiry as to the reasons which operated on the minds of members in voting for the measure, is wholly immaterial.

If section first of article first of the Constitution asserts a principle not susceptible of practical application, then it may admit of a question whether any principle asserted in the declaration of rights can be the subject of judicial enforcement. And if such a position be true that the rights of property can not be enforced by the Courts against an act of the Legislature, a power is then conceded which renders the provisions of the other sections wholly inoperative.

The right to possess and protect property is not more clearly protected by the Constitution, than the right to acquire it. The right to acquire is the right to use the proper means to attain the end; and the use of such means, can not be prohibited by the Legislature, except the peace and safety of the State require it.

Free agents must be left free, as to themselves. If they can not be trusted to regulate their own labor, its times, and quantity, it is difficult to trust them to make their own contracts. If the Legislature can prescribe the *days* of rest for them, it would seem that the same power can prescribe the *hours* to work, rest, and eat.

*Per Field, J., dissenting.*—The "Act to provide for the better observance of the Sabbath," is not in conflict with the fourth section of article one of the Constitution, which declares that "the free exercise and enjoyment of religious profession and worship without discrimination or preference, shall for ever be allowed in this State."

Ex parte Newman.

The act establishes, as a civil regulation, a day of rest from secular pursuits, and that is its only scope and purpose. It treats of business matters, not religious duties. In limiting its command to secular pursuits it necessarily leaves religious profession and worship free.

It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power not conferred by the Constitution.

The object of the act is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it.

The title of the act, and the description of the day, will not warrant the conclusion that the intention of the law is to enforce the Sabbath as a religious institution. The terms "Christian Sabbath or Sunday," are used simply to designate the day selected by the Legislature. The same construction would obtain and the same result follow, if any other terms were employed, as "the Lord's day, commonly called Sunday," "the Sabbath day," or "the first day of the week," which are found in similar statutes of other States.

That the law operates with inconvenience to some is no argument against its constitutionality. Such inconvenience is an incident to all general laws.

The title of an act is never held to control the legislative intent. This intent is to be sought in the purview or body of the act; and when the language in this part is clear and unambiguous, no other part can avail to contradict or control it. The title can be resorted to only in cases of ambiguity, and is then of slight value.

Nor is this well-settled rule as to the effect of a title, in any degree changed by the twenty-fifth section of article four of the Constitution, which requires that "every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title." This section is merely directory, and does not nullify laws passed in violation of it.

In determining the question of power in the Legislature to pass the act, the Court can not consider whether that power was wisely or unwisely exercised, or from pure or impure motives.

The act is not in conflict with the first section of article one of the Constitution, which declares that "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness."

The rights enumerated in this section are to be enjoyed in a constitutional government in subordination to the general laws of the State. This section was never intended to inhibit legislation on the rights enumerated.

The Legislature possesses the power to legislate for the good order, the peace, welfare, and happiness of society. The means by which these ends are to be effected are left to its discretion, but because the discretion may be abused its acts are not for that reason void.

It is to be supposed that the members of the Legislature will exercise some wisdom in its acts. If they do not, the remedy is with the people. Frequent elections by the people furnish the only protection against the abuse of acknowledged legislative power.

The right to acquire property may be regulated for the public good, though thereby the facility of acquisition is lessened.

The judiciary does not possess the right to supervise the exercise of legislative discretion in matters of mere expediency, and the assumption of such right would be usurpation.

The "Act to provide for the better observance of the Sabbath, approved April 10, 1858," is constitutional.

### HABEAS CORPUS.

Newman, the petitioner, was tried, and convicted before a justice of the peace of the city of Sacramento, for a violation of the act of April 10th, 1858, entitled "An Act to provide for the better observance of the Sabbath," and was sentenced to pay a fine of fifty dollars, and the costs of the prosecution—twenty dol-

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lars—or, in default of the payment of such fine and costs, to be imprisoned thirty-five days. Failing to pay the fine and costs imposed, he was imprisoned. The petitioner is an Israelite, engaged in the business of selling clothing, at Sacramento. The offence of which he was convicted was the sale of goods on Sunday. Upon his imprisonment, he petitioned this Court for a writ of *habeas corpus*, and prayed that he might be discharged from imprisonment, on the ground of the illegality of the same, by reason of the unconstitutionality of the act.

The writ was issued, and on the return thereof, the petitioner was discharged.

*Heydenfeldt and Welty* for Petitioner.

*Attorney-General and District-Attorney Morrison* for the People.

TERRY, C. J.—The petitioner was tried and convicted before a justice of the peace for a violation of the act of April, 1858, entitled “An Act for the better observance of the Sabbath,” and, upon his failure to pay the fine imposed, was imprisoned.

The counsel for petitioner moves his discharge, on the ground that the act under which these proceedings were had is in conflict with the first and fourth sections of the first article of the State Constitution, and therefore void.

The first section declares “all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.”

The fourth section declares “the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever be allowed in this State.”

The questions which arise in the consideration of the case, are:

1. Does the act of the Legislature make a discrimination or preference favorable to one religious profession, or is it a mere civil rule of conduct?

2. Has the Legislature the power to enact a municipal regulation which enforces upon the citizen a compulsory abstinence from his ordinary lawful and peaceable avocations for one day in the week?

There is no expression in the act under consideration which can lead to the conclusion that it was intended as a civil rule, as contradistinguished from a law for the benefit of religion. It is entitled “An Act for the better observance of the Sabbath,” and the prohibitions in the body of the act are confined to the “Christian Sabbath.”

It is, however, contended, on the authority of some of the decisions of other States, that notwithstanding the pointed language

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of the act, it may be construed into a civil rule of action, and that the result would be the same, even if the language were essentially different.

The fault of this argument is that it is opposed to the universally admitted rule which requires a law to be construed according to the intention of the law-maker, and this intention to be gathered from the language of the law, according to its plain and common acceptation.

It is contended that a civil rule requiring the devotion of one-seventh of the time to repose is an absolute necessity, and the want of it has been dilated upon as a great evil to society. But have the Legislature so considered it? Such an assumption is not warranted by anything contained in the Sunday law. On the contrary, the intention which pervades the whole act is to enforce, as a *religious institution*, the observance of a day held sacred by the followers of one faith, and entirely disregarded by all the other denominations within the State. The whole scope of the act is expressive of an intention on the part of the Legislature to require a periodical cessation from ordinary pursuits, not as a civil duty, necessary for the repression of any existing evil, but in furtherance of the interests, and in aid of the devotions of those who profess the Christian religion.

Several authorities, affirming the validity of similar statutes, have been cited from the reports of other States. While we entertain a profound respect for the Courts of our sister States, we do not feel called upon to yield our convictions of right to a blind adherence to precedent; especially when they are, in our opinion, opposed to principle; and the reasoning by which they are endeavored to be supported is by no means satisfactory or convincing. In *Bryan v. Berry*, (6 Cal., 398,) in reference to the decisions of other States, we said, "decided cases are, in some sense, evidence of what the law is. We say in some sense, because it is not so much the decision as it is the reasoning upon which the decision is based, which makes it authority, and requires it to be respected."

It will be unnecessary to examine all the cases cited by the district-attorney. The two leading cases in which the question is more elaborately discussed than in the others, are the cases of *Sepect v. The Commonwealth*, (8 Barr, 313,) and *The City Council v. Benjamin*, (2 Schobart, 508,) decided respectively by the Supreme Courts of Pennsylvania and South Carolina. These decisions are based upon the ground that the statutes requiring the observance of the Christian Sabbath established merely a civil rule, and make no discrimination or preference in favor of any religion. By an examination of these cases, it will be seen that the position taken rests in mere assertion, and that not a single argument is adduced to prove that a preference in favor of the Christian religion is not given by the law. In the case in

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8 Barr, the Court said : " It (the law) intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences ; it compels none to attend, erect, or support any place of worship, or to maintain any ministry, against his consent ; it pretends not to control or interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship."

This is the substance of the arguments to show that these laws establish no preference. The last clause in the extract asserts the proposition broadly ; but it is surely no legitimate conclusion from what precedes it, and must be taken as the plainest example of *petitio principii*. That which precedes it establishes that the law does not destroy religious toleration, but that is all.

Now, does our Constitution, when it forbids discrimination or preference in religion, mean merely to guaranty toleration ? For that, in effect, is all which the cases cited seem to award, as the right of a citizen. In a community composed of persons of various religious denominations, having different days of worship, each considering his own as sacred from secular employment, all being equally considered and protected under the Constitution, a law is passed which in effect recognizes the sacred character of one of these days, by compelling all others to abstain from secular employment, which is precisely one of the modes in which its observance is manifested and required by the creed of that sect to which it belongs as a Sabbath. Is not this a discrimination in favor of the one ? Does it require more than an appeal to one's common sense to decide that this is a preference ? And when the Jew, or Seventh-Day Christian complains of this, is it any answer to say, your conscience is not constrained, you are not compelled to worship or to perform religious rites on that day, nor forbidden to keep holy the day which you esteem as a Sabbath ? We think not, however high the authority which decides otherwise.

When our liberties were acquired, our republican form of government adopted, and our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense—a complete separation between Church and State, and a perfect equality without distinction between all religious sects. " Our Government," said Mr. Johnson, in his celebrated Sunday-mail report, " is a civil and not a religious institution ; whatever may be the religious sentiments of citizens, and however variant, they are alike entitled to protection from the government, so long as they do not invade the rights of others." And again, dwelling upon the danger of applying the powers of government to the furtherance and support of sectarian objects, he remarks, in language which should not be forgotten, but which ought to be deeply impressed on the minds of all who

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desire to maintain the supremacy of our republican system: "Extensive religious combinations to effect a political object, were, in the opinion of the committee, always dangerous. The first effort of the kind calls for the establishment of a principle which would lay the foundation for dangerous innovation upon the spirit of the Constitution, and upon the religious rights of the citizen. If admitted, it may be justly apprehended that the future measures of the Government will be strangely marked, if not eventually controlled by the same influence. All religious despotism commences by combination and influence, and when that influence begins to operate upon the political institution of a country, the civil power soon bends under it, and the catastrophe of other nations furnishes an awful warning of the consequences. \* \* \* What other nations call religious toleration, we call religious rights; they were not exercised in virtue of governmental indulgence, but as rights of which the government cannot deprive any portion of her citizens, however small. Despotic power may invade those rights, but justice still confirms them. Let the National Legislature once perform an act which involves the decision of a religious controversy, and it will have passed its legitimate bounds. The precedent will then be established, and the foundation laid for that usurpation of the divine prerogative in this country, which has been the desolating scourge of the fairest portions of the old world. Our Constitution recognizes no other power than that of persuasion for enforcing religious observances."

We come next to the question whether, considering the Sunday law as a civil regulation, it is in the power of the Legislature to enforce a compulsory abstinence from lawful and ordinary occupation for a given period of time, without some apparent civil necessity for such action; whether a pursuit, which is not only peaceable and lawful, but also praiseworthy and commendable, for six days in the week, can be arbitrarily converted into a penal offence or misdemeanor on the seventh. As a general rule, it will be admitted that men have a natural right to do anything which their inclinations may suggest, if it be not evil in itself, and in no way impairs the rights of others. When societies are formed, each individual surrenders certain rights, and as an equivalent for that surrender has secured to him the enjoyment of certain others appertaining to his person and property, without the protection of which society cannot exist. All legislation is a restraint on individuals, but it is a restraint which must be submitted to by all who would enjoy the benefits derived from the institutions of society.

It is necessary, for the preservation of free institutions, that there should be some general and easily recognized rule, to determine the extent of governmental power, and establish a proper line of demarkation between such as are strictly legitimate and

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such as are usurpations which invade the reserved rights of the citizen and infringe upon his constitutional liberty. The true rule of distinction would seem to be that which allows to the Legislature the right so to restrain each one, in his freedom of conduct, as to secure perfect protection to all others from every species of danger to person, health, and property; that each individual shall be required so to use his own as not to inflict injury upon his neighbor, and these, we think, are all the immunities which can be justly claimed by one portion of society from another, under a government of constitutional limitation. For these reasons, the law restrains the establishment of tanneries, slaughter-houses, gunpowder depots, the discharge of fire-arms, etc., in a city, the sale of drugs and poisons, and the practice of physic by incompetent persons, and makes a variety of other prohibitions, the reason and sense of which are obvious to the most common understanding.

Now, when we come to inquire what reason can be given for the claim of power to enact a Sunday law, we are told, looking at it in its purely civil aspect, that it is absolutely necessary for the benefit of his health and the restoration of his powers, and in aid of this great social necessity, the Legislature may, for the general convenience, set apart a particular day of rest, and require its observance by all.

This argument is founded on the assumption that mankind are in the habit of working too much, and thereby entailing evil upon society, and that without compulsion they will not seek the necessary repose which their exhausted natures demand. This is to us a new theory, and is contradicted by the history of the past and the observations of the present. We have heard, in all ages, of declamations and reproaches against the vice of indolence, but we have yet to learn that there has ever been any general complaint of an intemperate, vicious, unhealthy or morbid industry. On the contrary, we know that mankind seek cessation from toil from the natural influences of self-preservation, in the same manner and as certainly as they seek slumber, relief from pain, or food to appease their hunger.

Again, it may be well considered, that the amount of rest which would be required by one-half of society may be widely disproportionate to that required by the other. It is a matter of which each individual must be permitted to judge for himself, according to his own instincts and necessities. As well might the Legislature fix the days and hours for work, and enforce their observance by an unbending rule which shall be visited alike upon the weak and strong. Whenever such attempts are made, the law-making power leaves its legitimate sphere, and makes an incursion into the realms of physiology, and its enactments, like the sumptuary laws of the ancients, which prescribe the mode and texture of people's clothing, or similar laws which

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might prescribe and limit our food and drink, must be regarded as an invasion, without reason or necessity, of the natural rights of the citizen, which are guarantied by the fundamental law.

The truth is, however much it may be disguised, that this one day of rest is a purely religious idea. Derived from the Sabbathical institutions of the ancient Hebrew, it has been adopted into all the creeds of succeeding religious sects throughout the civilized world; and whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the Christian, it is alike fixed in the affections of its followers, beyond the power of eradication, and in most of the States of our Confederacy, the aid of the law to enforce its observance has been given, under the pretence of a civil, municipal, or police regulation.

But it has been argued that this is a question exclusively for the Legislature; that the law-making power alone has the right to judge of the necessity and character of all police rules, and that there is no power in the judiciary to interfere with the exercise of this right.

One of the objects for which the judicial department is established is the protection of the constitutional rights of the citizen. The question presented in this case is not merely one of expediency or abuse of power; it is a question of usurpation of power. If the Legislature have the authority to appoint a time of compulsory rest, we would have no right to interfere with it, even if they required a cessation from toil for six days in the week instead of one. If they possess this power, it is without limit, and may extend to the prohibition of all occupations at all times.

While we concede to the Legislature all the supremacy to which it is entitled, we can not yield to it the omnipotence which has been ascribed to the British Parliament, so long as we have a Constitution which limits its powers, and places certain innate rights of the citizen beyond its control.

It is said that the first section of article first of the Constitution is a common-place assertion of a general principle, and was not intended as a restriction upon the power of the Legislature. This Court has not so considered it.

In *Billings v. Hall*, (7 Cal., 1,) Chief Justice Murray says, in reference to this section of the Constitution: "This principle is as old as the Magna Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State, as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea, but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen."

In the same case, Mr. Justice Burnett asserted the following

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principles, which bear directly upon the question : "That among the inalienable rights declared by our Constitution as belonging to each citizen, is a right of 'acquiring, possessing, and protecting property.' \* \* 'That for the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and the practical result of which would be to destroy, not conserve the rights it vainly assumed to protect.' "

Upon this point, I dissent from the opinion of the Court in *Billings v. Hall*, and if I considered the question an open one, I might yet doubt its correctness, but the doctrine announced in that opinion having received the sanction of the majority of the Court, has become the rule of decision, and it is the duty of the Court to see it is uniformly enforced, and that its application is not confined to a particular class of cases.

It is the settled doctrine of this Court to enforce every provision of the Constitution in favor of the rights reserved to the citizen against a usurpation of power in any question whatsoever, and although in a doubtful case, we would yield to the authority of the Legislature, yet upon the question before us, we are constrained to declare that, in our opinion, the act in question is in conflict with the first section of article first of the Constitution, because, without necessity, it infringes upon the liberty of the citizen, by restraining his right to acquire property.

And that it is in conflict with the fourth section of the same article, because it was intended as, and is in effect, a discrimination in favor of one religious profession, and gives it a preference over all others.

It follows that the petitioner was improperly convicted, and it is ordered that he be discharged from custody.

BURNETT, J.—The great importance of the constitutional principle involved, and the different view I take of some points, make it proper for me to submit a separate opinion. The question is one of no ordinary magnitude, and of great intrinsic difficulty. The embarrassment we might otherwise experience in deciding a question of such interest to the community, and in reference to which there exists so great a difference of opinion, is increased by the consideration that the weight of the adjudged cases is against the conclusion at which we have been compelled to arrive.

In considering this constitutional question it must be conceded that there are some great leading principles of justice, eternal and unchangeable, that are applicable at all times and under all circumstances. It is upon this basis that all Constitutions of

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free government must rest. A Constitution that admits that there are *any inalienable* rights of human nature reserved to the individual, and not ceded to society, must, of logical necessity, concede the truth of this position. But it is equally true, that there are *other* principles, the application of which may be justly modified by circumstances.

It would seem to be true, that exact justice is only an exact conformity to some *law*. Without law there could be neither merit or demerit, justice or injustice; and when we come to decide the question, whether a given act be just or unjust, we must keep in our view that system of law by which we judge it. As judged by one code of law, the act may be innocent; while as judged by another, it may be criminal. As judged by the system of abstract justice (which is only that code of law which springs from the natural relation and fitness of things,) there must be certain inherent and inalienable rights of human nature that no government can rightfully take away. These rights are retained by the individual because their surrender is not required by the good of the whole. The just and legitimate ends of civil government can be practically and efficiently accomplished whilst these rights are retained by the individual. Every person, upon entering into a state of society, only surrenders so much of his individual rights as may be necessary to secure the substantial happiness of the community. Whatever is not necessary to attain this end is reserved to himself.

But, conceding the entire correctness of these views, it must be equally clear that the original and primary jurisdiction to determine the question *what are these inalienable rights*, must exist somewhere; and wherever placed, its exercise must be conclusive, in the contemplation of the theory, upon all.

The power to decide what individual right must be conceded to society, originally existed in the sovereign people who made the Constitution. As they possessed this primary and original jurisdiction, their action must be final. If they exercised this power, in whole or in part, in the formation of the Constitution, their action, *so far*, is conclusive.

It must also be conceded that this power, from its very nature, must be legislative and not judicial. The question is simply one of necessity—of abstract justice. It is a question that naturally enters into the mind of the law-maker, not into that of the law-exponent. The judicial power, from the nature of its functions, can not determine such a question. Judicial justice is but conformity to the law *as already made*.

If these views be correct, the judicial department can not, *in any case*, go behind the Constitution, and by any *original* standard judge the justice or legality of any single one or more of its provisions. The judiciary is but the creature of the Constitution, and can not judge its creator. It can not rise above the

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source of its own existence. If it could do this, it could annul the Constitution, instead of simply declaring what it means. And the same may be said of any act of the Legislature, if within the limits of its discretion, *as defined* by the Constitution. Such an act of the Legislature is as much beyond the reach of the judiciary as is the Constitution itself. (1 Bald. R., 74; 1 Brock. R., 334; 10 Peters, 478; 5 Geo. R., 194.)

But it is the right and the imperative duty of this Court to construe the Constitution and statutes, in the last resort; and, from that construction, to ascertain the will of the law-maker. And the only legitimate purpose for which a Court can resort to the principles of abstract justice, is to ascertain the proper construction of the law in cases of doubt. When, in the opinion of the Court, a given construction is clearly contrary to the manifest principles of justice, then it will be presumed, in a case not free from doubt, that the Legislature never intended such a consequence. (*Varick v. Briggs*, 6 Paige, 330; *Flint River Steamboat Company v. Foster*, 5 Geo. R., 194.) But when the intention is clear, however unjust and absurd the consequences may be, it must prevail, unless it contravenes a constitutional provision.

If these views be correct, it follows that there can be for this Court no higher law than the Constitution; and in determining this question of constitutional construction, we must forget, as far as in us lies, that we are religious or irreligious men. It is solely a matter of construction, with which our individual feelings, prejudices, or opinions upon abstract questions of justice, can have nothing to do. The Constitution may have been unwisely framed. It may have given too much or too little power to the Legislature. But these are questions for the statesman, not for the jurist. Courts are bound by the law as it is.

The British Constitution differs from our American Constitutions in one great leading feature. It only classifies and distributes, but does not *limit* the powers of government; while our Constitutions do *both*. It is believed that this difference has been sometimes overlooked by our Courts, in considering constitutional questions; and English authorities followed in cases to which they could not properly be applied. We often meet with the expression that Christianity is a part of the common law. Conceding that this is true, it is not perceived how it can influence the decision of a constitutional question. The Constitution of this State will not tolerate any discrimination or preference in favor of any religion; and, so far as the common law conflicts with this provision, it must yield to the Constitution. Our constitutional theory regards all religions, *as such*, equally entitled to protection, and all equally unentitled to any preference. Before the Constitution they are all equal. In so far as the principles found in all, or in any one or more of the different

religious systems, are considered applicable to the ends legitimately contemplated by civil constitutional government, they can be embodied in our laws, and enforced. But when there is no ground or necessity upon which a principle can rest but a religious one, then the Constitution steps in and says that you *shall not enforce it by authority of law*.

The Constitution says, that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever be allowed in this State."

If we give this language a mere literal construction, we must conclude that the protection given is only intended for the professor, and not for him who does not worship. "The free exercise and enjoyment of religious profession and worship," is the thing expressly protected by the Constitution. But taking the whole section together, it is clear that the scope and purpose of the Constitution was to assert the great, broad principle of religious freedom for all—for the believer and the unbeliever. The government has no more power to punish a citizen when he professes no religion, than it has to punish him when he professes any particular religion.

The act of the Legislature under consideration violates this section of the Constitution, because it establishes a compulsory religious observance; and not, as I conceive, because it makes a discrimination between different systems of religion. If it be true, that the Constitution intended to secure entire religious freedom to all, without regard to the fact whether they were believers or unbelievers, then it follows that the Legislature could not create and enforce any merely religious observance whatever. It was the purpose of the Constitution to establish a *permanent* principle, applicable at all times, under all circumstances, and to all persons. If all the people of the State had been unbelievers, the act would have been subject to the same objection. So, if they had all been Christians, the power of the Legislature to pass the act would equally have been wanting. The will of the whole people has been expressed through the Constitution; and until this expression of their will has been changed in some authoritative form, it must prevail with all the departments of the State government. The Constitution, from its very nature as a permanent organic act, could not shape its provisions so as to meet the changing views of individuals. Had the act made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same. The fact that the Christian *voluntarily* keeps holy the first day of the week, does not authorize the Legislature to make that observance *compulsory*. The Legislature can not compel the citizen to do that which the Constitution leaves him free to do or omit, at his election. The act violates as much the religious freedom of the Christian as of the Jew. Because the conscientious views of

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the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship, and assumes the power to compel him to do that which he has the right to omit if he pleases. The principle is the same, whether the act of the Legislature *compels* us to do that which we wish to do, or not to do.

The *compulsory* power does not exist in either case. If the Legislature has power over the subject, this power exists without regard to the particular views of individuals. The sole inquiry with us is, whether the Legislature can create a day of compulsory rest. If the Legislature has the power, then it has the right to select the particular day. It could not well do otherwise.

The protection of the Constitution extends to *every* individual or to none. It is the individual that is intended to be protected. The principle is the same, whether the many or the few are concerned. The Constitution did not mean to inquire how many or how few would profess or not profess this or that particular religion. If there be but a single individual in the State who professes a particular faith, he is as much within the sacred protection of the Constitution as if he agreed with the great majority of his fellow-citizens. We can not, therefore, inquire into the particular views of the petitioner, or of any other individual. We are not bound to take judicial notice of such matters, and they are not matters of proof. There may be individuals in the State that hold Monday as a Sabbath. If there be none such now, there may be in the future. And, if the unconstitutionality of an act of this character depended, in any manner, upon the fact that a particular day of the week was selected, then it follows, that any individual could defeat the act by professing to hold the day specified as his Sabbath. The Constitution protects the freedom of religious *profession* and *worship*, without regard to the sincerity or insincerity of the worshipper. We could not inquire into the fact, whether the individual professing to hold a particular day as his Sabbath was sincere or otherwise. He has the right to profess and worship as he pleases, without having his motives inquired into. His motives in exercising a constitutional privilege are matters too sacred to be submitted to judicial scrutiny. Every citizen has the undoubted right to vote and worship as he pleases, without having his motives impeached in any tribunal of the State.

Under the Constitution of this State, the Legislature can not pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When, therefore, the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from

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doing anything, because it violates simply a religious principle or observance, the act is unconstitutional.

In considering the question whether the act can be sustained, upon the ground that it is a mere municipal regulation, the inquiry as to the reasons which operated upon the minds of members, in voting for the measure, is, as I conceive, wholly immaterial. The constitutional question is a naked question of legislative power. Had the Legislature the power to do the particular thing done? What was that particular thing? It was the prohibition of labor on Sunday. Had the act been so framed as to show that it was intended by those who voted for it, as simply a municipal regulation; yet, if, in fact, it contravened the provision of the Constitution securing religious freedom to all, we should have been compelled to declare it unconstitutional for *that* reason. So, the fact that the act is so framed as to show that a different reason operated upon the minds of those who voted for it, will not prevent us from sustaining the act, if any portion of the Constitution conferred the power to pass it upon the Legislature.

Where the power exists to do a particular thing, and the thing is done, the reason which induced the act is not to be inquired into by the Courts. The power may be abused; but the abuse of the power can not be avoided by the judiciary. A Court may give a wrong reason for a proper judgment; still, the judgment must stand. The members of the Legislature may vote for a particular measure from erroneous or improper motives. The only question with the Courts is, whether that body had the power to command the particular act to be done or omitted. The view here advanced, is sustained substantially by the decision in the case of *Fletcher v. Peck*, (6 Cranch, 131.)

It was urged, in argument, that the provision of the first section of the first article of the Constitution, asserting the "inalienable right of acquiring, possessing, and protecting property," was only the statement in general terms, on a general principle, not capable in its nature of being judicially enforced.

It will be observed that the first article contains a declaration of rights, and if the first section of that article asserts a principle not susceptible of practical application, then it may admit of a question whether any principle asserted in this declaration of rights can be the subject of judicial enforcement. But that at least a portion of the general principles asserted in that article can be enforced by judicial determination, must be conceded. This has been held at all times, by all the Courts, so far as I am informed.

The provisions of the sixteenth section of the first article, which prohibits the Legislature from passing any law impairing the obligation of contracts, is based essentially upon the same ground as the first section, which asserts the right to acquire,

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possess, and defend property. The right substantially secured by both sections is the right of property. This right of property is the substantial basis upon which the provisions of both sections must rest. The reason of, and the end to be accomplished by, each section, are the same. The debtor has received property or other valuable consideration for the sum he owes the creditor, and the sum, when collected by the creditor, becomes his property. The right of the creditor to collect from the debtor that which is due, is essentially a right of property. It is the right to obtain from the debtor property which is unjustly detained from the creditor.

If we take the position to be true, for the sake of the argument, that the right of property can not be enforced by the Courts against an act of the Legislature, we then concede a power that renders the restrictions of other sections inoperative. For example, if the Legislature has the power to take the property of one citizen, and give it to another without compensation, the prohibition to pass any law impairing the obligation of contracts, could readily be avoided. All the Legislature would have to do to accomplish this purpose, would be to allow the creditor first to collect his debt, and afterwards take the property of the creditor, and give it to the debtor. For if we once concede the power of the Legislature to take the property of A and give it to B, without compensation, we must concede to that body the exclusive right to judge when, and in what instances, this conceded right should be exercised.

It was also insisted, in argument, that the judicial enforcement of the right of property, as asserted in the first section, is inconsistent with the power of compulsory process, to enforce the collection of debts by the seizure and sale of the property of the debtor. But is this true? On the contrary, is not the power to seize and sell the property of the debtor expressly given by the Constitution for the very purpose of protecting and enforcing this right of property? When the Constitution says that you shall not impair the obligation of the contract, it says *in direct effect* that you shall enforce it; and the only means to do this efficiently is by a seizure and sale. The seizure and sale of the property of the debtor was contemplated by the Constitution, as being a part of the contract itself. The debtor stipulates in the contract, that, in case he fails to pay, the creditor may seize and sell his property by legal process. Such is the legal effect of the contract, because the existing law enters into and forms a part of it.

The different provisions of the Constitution will be found, when fairly and justly considered, to be harmonious and mutually dependent one upon the other. A general principle may be asserted in one section without any specification of the exceptions in that place. But it must be evident that practical

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convenience and logical arrangement will not always permit the exceptions to be stated in the same section. It is matter of no importance in what part of the Constitution the exception may be found. Wherever found, it must be taken from the general rule, leaving the remainder of the rule to stand. The general right of enjoying and defending life and liberty is asserted in the first section of the first article; while the exceptions are stated in the eighth, ninth, fifteenth, and eighteenth sections of the same article. A party may, by express provisions of the Constitution, forfeit his liberty. The same remark, in reference to exceptions to general principles, will apply to other provisions.

The right to protect and possess property is not more clearly protected by the Constitution than the right to acquire. The right to acquire must include the right to use the proper means to attain the end. The right itself would be impotent without the power to use its necessary incidents. The Legislature, therefore, can not prohibit the proper use of the means of acquiring property, except the peace and safety of the State require it. And in reference to this point, I adopt the reasons given by the Chief Justice, and concur in the views expressed by him.

There are certain classes of subjects over which the Legislature possesses a wide discretion; but still this discretion is confined within certain limits; and although, from the complex nature of the subject, these limits cannot always be definitely settled in advance, they do and must exist. It was long held, in general terms, that the Legislature had the power to regulate the remedy; but cases soon arose where the Courts were compelled to interpose. In the case of *Bronson v. Kenzie*, (1 How. U. S. R., 311,) Chief Justice Taney uses this clear language:

"It is difficult, perhaps, to draw a line that would be applicable in all cases, between legitimate alterations of the remedy and provisions which in the form of remedy impair the right; but it is manifest that the obligation of the contract may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by hampering the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

So, the power of the Legislature to pass Recording Acts and Statutes of Limitations is conceded, in general terms, and a wide discretion given. Yet, in reference to these powers, Mr. Justice Baldwin, in delivering the opinion of the Supreme Court of the United States, in the case of *Jackson v. Lamphine* (3 Peters, 289,) uses this language:

"Cases may occur where the provisions of a law on these subjects may be so unreasonable as to amount to a denial of the right and call for the interposition of the Court."

The Legislature is vested by the Constitution with a wide dis-

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cretion in determining what is necessary to the peace and safety of the State; yet this discretion has some limits. It may be difficult, in many cases, to define these limits with exact precision; but this difficulty can not show that there are no limits. Such difficulties must arise under every system of limited government.

The question arising under this act is quite distinguishable from the case where the Legislature of a State in which slavery is tolerated, passes an act for the protection of the slave against the inhumanity of the master in not allowing sufficient rest. In this State, every man is a free agent, competent and able to protect himself, and no one is bound by law to labor for any particular person. Free agents must be left free, as to *themselves*. Had the act under consideration been confined to infants or persons bound by law to obey others, then the question presented would have been very different. But if we can not trust free agents to regulate their own labor, its times and quantity, it is difficult to trust them to make their own contracts. If the Legislature could prescribe the *days* of rest for them, then it would seem that the same power could prescribe the hours to work, rest, and eat.

For these reasons, I concur with the Chief Justice in discharging the petitioner.

FIELD, J.—After a careful and repeated perusal of the opinions of my associates, I am unable to concur either in their reasoning or in their judgment. I can not perceive any valid ground for declaring the Act of 1858, for the better observance of the Sabbath, unconstitutional. In ordinary cases, I should be content with refraining from a concurrence, or expressing a simple dissent, but, in the present case, I feel compelled to state the reasons of my dissent, as the opinions of my associates appear to me to assert a power in the judiciary never contemplated by the Constitution, and of dangerous consequences; and to adopt a construction of constitutional provisions, which must deprive the Legislature of all control over a great variety of subjects, upon which its right to legislate, in the promotion of the public weal, has never been doubted.

The enactment in question is held to conflict with the first and fourth sections of the first article of the Constitution.

The first section declares that "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

The fourth section declares that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever be allowed in this State."

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In examining the questions raised by the petitioner, I will first consider the fourth section, and whether the statute is in any sense within its provisions. The statute is prohibitory in its character, and its constitutionality must be determined by the acts it forbids. The inquiry is as to the power of the Legislature, not as to the motives which induced the enactment. That power is exhibited in the clause which provides that no person shall, on the Christian Sabbath, or Sunday, keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment, or other business house, for business purposes; or sell, or expose for sale, any goods, wares, or merchandise on that day, and fixes the penalty for the violation of the provision. If the exercise of this power is not prohibited to the Legislature by the Constitution, either in express terms, or by necessary implication, it is our duty to uphold the statute. Of its wisdom or policy, it is not within our province to judge. In what manner it conflicts with the fourth section I am unable to perceive. What have the sale of merchandise, the construction of machines, the discount of notes, the drawing of bills of exchange, the purchase of gold, or the business of the artisan, mechanic, or manufacturer, to do with religious profession or worship? There is no necessary connection between them. The petitioner is an Israelite, engaged in the sale of clothing, and his complaint is, not that his religious profession or worship is interfered with, but that he is not permitted to dispose of his goods on Sunday; not that any religious observance is imposed upon him, but that his secular business is closed on a day on which he does not think proper to rest. In other words, the law, as a civil regulation, by the generality of its provisions, interrupts his acquisitions on a day which does not suit him. The law treats of business matters, not religious duties. In fixing a day of rest, it establishes only a rule of civil conduct. In limiting its command to secular pursuits, it necessarily leaves religious profession and worship free. It is absurd to say that the sale of clothing, or other goods, on Sunday, is an act of religion or worship; and it follows that the inhibition of such sale does not interfere with either. Religious profession springs from matters of faith, and religious worship is the adoration of the soul. As to the forms in which that profession or worship shall be exhibited, the law is silent; it utters no command, and it imposes no restraint. It makes no discrimination or preference between the Hebrew and Gentile, the Mussulman and Pagan, the Christian and Infidel, but leaves to all the privilege of worshipping God, or of denying His existence, according to the conclusions of their own judgments, or the dictates of their own consciences. *It does not even allude to the subject of religious profession or worship, in any of its provisions.* It establishes, as a civil regulation, a day of rest from secular pursuits, and that is its only scope and purpose. Its requirement is a cessa-

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tion from labor. In its enactment, the Legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience, and sustained by science. There is no nation, possessing any degree of civilization, where the rule is not observed, either from the sanctions of the law, or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule founded upon a law of our race.

The Legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in judgment upon its action. It is not for the judiciary to assume a wisdom which it denies to the Legislature, and exercise a supervision over the discretion of the latter. It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution.

It is no answer to the requirements of the statute to say that mankind will seek cessation from labor by the natural influences of self-preservation. The position assumes that all men are independent, and at liberty to work whenever they choose. Whether this be true or not in theory, it is false in fact; it is contradicted by every day's experience. The relations of superior and subordinate, master and servant, principal and clerk, always have and always will exist. Labor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. The necessities for food and raiment are imperious, and the exactions of avarice are not easily satisfied. It is idle to talk of a man's freedom to rest when his wife and children are looking to his daily labor for their daily support. The law steps in to restrain the power of capital. Its object is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Its aim is to prevent the physical and moral debility which springs from uninterrupted labor; and in this aspect it is a beneficent and merciful law. It gives one day to the poor and dependent; from the enjoyment of which no capital or power is permitted to deprive them. It is theirs for repose, for social intercourse, for moral culture, and, if they choose, for divine

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worship. Authority for the enactment I find in the great object of all government, which is protection. Labor is a necessity imposed by the condition of our race, and to protect labor is the highest office of our laws.

But is urged that the intention of the law is to enforce the Sabbath as a religious institution. This position is assumed from the description of the day and the title of the act, but is not warranted by either. The terms "Christian Sabbath or Sunday," are used simply to designate the day selected by the Legislature. The same construction would obtain and the same result follow if any other terms were employed, as "the Lord's day, commonly called Sunday," contained in the statute of Pennsylvania, or simply "the Sabbath day," or "the first day of the week," as in several statutes. The power of selection being in the Legislature, there is no valid reason why Sunday should not be designated as well as any other day. Probably no day in the week could be taken which would not be subject to some objection. That the law operates with inconvenience to some is no argument against its constitutionality. Such inconvenience is an incident to all general laws. A civil regulation can not be converted into a religious institution because it is enforced on a day which a particular religious sect regards as sacred. The Legislature has seen fit, in different enactments, to prohibit judicial and various kinds of official business on Sunday, and yet it has never been contended that these enactments establish any religious observances, or that the compulsory abstinence from judicial or official labor is a discrimination or preference in favor of any religious sect. The law requires notes, when the last day of grace falls on Sunday, to be presented to the maker on Saturday, in order to hold the endorser. Would the complaint of an Israelite, that this was a discrimination in an important class of contracts in favor of the Christian, be listened to for a moment? But why not? In the course of his business it often becomes important to his interest that he should take commercial paper, not given to him in the first instance, and when, therefore, it is not in his power to fix the day of payment; and if the opinion of my associates is law, I see no reason why he should be compelled to have the note presented on Saturday, in order to hold the endorser. And why should he be denied the power of enforcing on that day, by legal process, contracts entered into with him? To be consistent, we ought to hold all this legislation as discriminating and giving a preference in favor of one religious sect, and therefore unconstitutional. The answer consists in the simple fact that the legislation is not based upon any idea of enforcing a religious observance, but of establishing, as a civil regulation, a day of rest from judicial and other official labor; and the Constitution itself contains a recognition of Sunday as a day of rest, in the clause which provides that a bill presented to

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the Governor shall become a law in like manner as if he had signed it, if not returned by him within ten days, *Sundays excepted*, unless the Legislature, by adjournment, prevent such return. The word *Sundays*, in the plural, is in the Constitution on file in the office of the Secretary of State, not *Sunday*, in the singular, as found in the printed copy. (*Price v. Whitman*, 8 Cal., 412; Const., Art. 4, § 17.)

The fact that the civil regulation finds support in the religious opinions of a vast majority of the people of California is no argument against its establishment. It would be fortunate for society if all wise civil rules obtained a ready obedience from the citizen, not merely from the requirements of the law, but from conscientious or religious convictions of their obligation. The law against homicide is not the less wise and necessary because the Divine command is, "thou shalt do no murder." The legislation against perjury is not the less useful and essential for the due administration of justice because the injunction comes from the Most High, "thou shalt not bear false witness against thy neighbor." The establishment by law of Sunday as a day of rest from labor, is none the less a beneficent and humane regulation, because it accords with the Divine precept that upon that day "thou shalt do no manner of work; thou, and thy son, and thy daughter, thy man-servant and thy maid-servant, thy cattle, and the stranger that is within thy gates."

The title of an act is never held to control the legislative intent. Originally it was considered as constituting no part of the act, "no more," says Lord Holt, "than the title of a book is part of a book." (*Wills v. Wilkins*, 6 Mod., 62; *Rex v. Williams*, 1 W. Bl., 85; 3 R., 38—*Poulter's case*.) It was usually framed by the clerk of the House in which the bill first passed, or by the Judges after the receipt of the King's answer to the petition of the Commons, and was intended only as a convenient mode of reference. At the present day it is seldom the subject of legislative discussion, and is evidence of little more than that the originator of the act saw fit to designate it by the particular name. (*Att'y Gen. v. Lord Weymouth*, 1 Ambler, 22.) The legislative intent is to be sought in the purview or body of the act, and where the language in this part is clear and unambiguous, no other part can avail to contradict or control it. The title can be resorted to only in cases of ambiguity, and is then of slight value. "It can only be used," says Sedgwick on Statutes, "for the fact of the makers having given a law a certain name, if that fact can render any assistance in doubtful cases." Nor is the well-settled rule as to the effect of a title in any degree changed by the twenty-fifth section of article four of the Constitution, which requires that "every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title." This section is merely directory; it does not nullify laws passed

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in violation of it. This was expressly held by this Court in *Washington v. Page*, (4 Cal., 388.) The opinion in that case was delivered by the late Chief Justice Murray, and concurred in by Mr. Justice Heydenfeldt. In it they say: "We regard this section of the Constitution as merely directory, and, if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must, in effect, obliterate almost every law from the statute book, unhinge the business, and destroy the labor of the last three years."

"The first Legislature that met under the Constitution seems to have considered this section as directory, and almost every act of that and the subsequent sessions would be obnoxious to this objection. \* \* With the policy or wisdom of the act we have nothing to do; it is simply our duty to determine its legality."

The law in question is free from all ambiguity. Its purview, or body, speaks a command which no one can mistake. Its title, therefore, is not a subject for consideration. The law would be equally obligatory if entitled "An Act to promote the general health." The section of the Constitution being directory in its character, can operate only on the conscience of the law-maker. Like the provision that the laws shall be published in Spanish, it creates a duty of imperfect obligation, which the judiciary can not enforce.

But, aside from these views, there is nothing in the title of the act open to criticism. It reads, "An Act to provide for the better observance of the Sabbath," which means nothing more or less than an act to provide for the better observance of a day of the week called the Sabbath. It does not indicate the manner of observance; that is exhibited in the body of the act. It is there commanded to be by cessation from labor, not by religious worship.

With the motives which operated upon the Legislature to pass the act, we have nothing to do. They may have been as varied as the different minds of its members. With some, religious convictions may have controlled; with others, a sense of the necessity of protecting labor; with some, a belief that it would be a popular law with their constituents; and with others, less worthy considerations. It is a question of power that we are determining, and whether that power was wisely or unwisely exercised, or from pure or impure motives, is of no moment. If we admit that the law had its origin in the religious opinions of the members of the Legislature, we advance nothing in favor of its constitutionality, and concede nothing against it. It would be, indeed, singular if a wise and beneficent law were the subject of objection, because suggested by the principles of a pure religion. Christianity is the prevailing faith of our people; it is the basis of our civilization; and that its spirit should infuse itself into

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and humanize our laws, is as natural as that the national sentiment of liberty should find expression in the legislation of the country.

The question as to the validity of a Sunday law, resembling in its general features the one under consideration, has frequently been before the highest Courts of our sister States, the Constitutions of which embody provisions similar to those contained in the Constitution of this State, *and in every instance, without exception, the constitutionality of the law has been affirmed.*

The Constitution of Pennsylvania declares that "all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." The Legislature of Pennsylvania passed an act, which, among other things, prohibited any person to "do or perform any worldly employment or business whatever on the Lord's day, commonly called Sunday, works of necessity or charity only excepted."

For a violation of this statute, one Specht was prosecuted before a justice of the peace. In his defence, he tendered a plea that he was a member in full communion of the Seventh-Day Baptist congregation, and that he conscientiously believed that the seventh day of the week was the true Sabbath of the Lord, and that he accordingly observed it as such. The justice refused to enter the plea, and sentenced the defendant to pay a fine. The Court of Common Pleas affirmed the judgment, and the defendant took the case to the Supreme Court. It was urged on his behalf that the statute controlled or interfered with the rights of conscience; that it treated the first day of the week as a *sacred* day, and prohibited labor on that day, not for the purpose of giving rest to man as a mere civil regulation, but because it *profaned the Lord's day*, and was therefore within the prohibition of the Constitution. But the Court affirmed the judgment, and said: "All agree that to the well-being of society periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the State may, without impropriety, interfere to fix the time of their stated return, and enforce obedience to the direction. When this happens, some one day must be selected, and it has been said, the round of the week presents none which, being preferred, might not be regarded as favoring some one of the numerous

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religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction; and as it is also devoted to religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord's day, and denominate the infraction of its legalized rest a profanation. *Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation, made for the government of man as a member of society.*" (Specht v. Commonwealth, 8 Barr, 312.)

The Constitution of South Carolina declares, like the Constitution of this State, that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this State to all mankind." An ordinance of the city of Charleston prohibited the sale of goods on Sunday, under which a Hebrew was prosecuted. The case was taken to the Court of Appeals, where it was contended that the ordinance was in conflict with the Constitution. But the Court held the ordinance valid, and said:

"If the Legislature, or the city of Charleston, were to declare that all shops within the State or city should be closed, and that no one should sell, or offer to sell, any goods, wares, or merchandise, on the fourth of July or eighth of January, in each year, would any one believe such a law was unconstitutional? It could not be pretended that religion had anything to do with that? What has religion to do with a similar regulation for Sunday? It is, in a political and social point of view, a mere day of rest. Its observance, as such, is a mere question of expediency. (City Council v. Benjamin, 2 Strob., 529.)

The Constitution of Ohio, of 1802, contains a clause similar to the one cited above from the Constitution of Pennsylvania, and in Bloom v. Richards, (2 Warden, 388,) the validity of the statute of that State prohibiting common labor on Sunday was considered, and the Court said: "We are, then, to regard the statute under consideration as a mere municipal, or police regulation, whose validity is neither strengthened or weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regular recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the General Assembly to require this cessation of labor, and to name the day of rest. It did so by the act referred to, and, in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected. But, regarded merely as an exertion of legislative authority, the act would have had neither more nor less validity had any other day been adopted."

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In twenty-five States of the Union, the statutes of which I have been able to examine, there are laws prohibiting secular business on Sunday, and in every one of these States, their validity has been upheld either by sustaining convictions had under them, or by annulling contracts made in violation of their provisions, or directly upon the question of their constitutionality.

In *Shover v. The State*, the Supreme Court of Arkansas held that the act prohibiting the keeping open of any store or the retail of any goods, etc., on Sunday could not, *with any propriety*, be said to trench upon any of the rights secured by the Constitution. (5 Eng., 262.)

This concurrence of opinion by the tribunals of so many different States, composed, in most instances, of Judges of distinguished ability and profound learning, ought to conclude the question before us. I do not assent to the proposition announced in *Bryan v. Berry*, (6 Cal., 398,) that the decisions of other Courts are authority and to be respected only from the reasoning upon which they are based. The proposition is not sound, except in a very restricted sense. The law is a science, whose leading principles are settled. They are not to be opened for discussion upon the elevation to the bench of every new Judge, however subtle his intellect, or profound his learning, or logical his reasoning. Upon their stability men rest their property, make their contracts, assert their rights, and claim protection. It is true that the law is founded upon reason, but by this is meant that it is the result of the general intelligence, learning, and experience of mankind, through a long succession of years, and not of the individual reasoning of one or of several judges. "Reason," says Lord Coke, "is the life of the law, nay, the common law itself is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason." It is possible that some intellects may rise to the perception of absolute truth, and be justified in questioning the general judgment of the learned of mankind. But before the legitimate and just inference arising from the general acquiescence of the learned can be avoided, the error in the principles recognized should be clearly shown. We should not blindly adhere to precedents, nor should we more blindly abandon them as guides.

In the present case, the question under consideration is one of power dependent upon the construction of sections of the Constitution. The rules of construction are settled, and possess all the certainty which can exist out of the exact sciences; they do not vary in different Courts; they are the same now that they were a century ago; they are the same now that they will be a century hence; and a concurrence upon their application, of the

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highest tribunals of every State where a Sunday law exists, in the same judgment, ought to inspire confidence in its soundness.

I pass to the consideration of the first section of the Constitution, which places among the inalienable rights of men "those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." This section embodies great principles of inestimable value, but was never intended to inhibit legislation upon the rights enumerated. Men have an inalienable right to enjoy and defend life and liberty, but the conditions of its enjoyment, the circumstances under which life may be forfeited, or liberty restrained, are the subjects of constant legislation. Men have an inalienable right to acquire, possess, and protect property, but the mode and manner of the acquisition, possession, and protection, are matters upon which laws are passed at every session of the Legislature. Men have an inalienable right of pursuing and obtaining safety and happiness, but subject to such restrictions as the public good may require.

The rights enumerated in the section are to be enjoyed in a constitutional government in subordination to the general laws of the State.

That the Legislature possesses the power to legislate for the good order, the peace, welfare, and happiness of society, is not denied. The means by which these ends are to be effected are left to its discretion. The existence of discretion implies a liability to abuse, but because the discretion of the Legislature may be abused, its acts are not, for that reason, void. It is no argument against the existence of the power to establish a day of rest that it may be exerted to the prohibition of labor for six days in the week instead of one. There is no single power which may not be so exercised as to become intolerable. The only limitation upon the exercise of the taxing power is that the taxation must be equal and uniform. The extent of the tax is not controlled, that rests in the discretion of the Legislature; it may amount to nearly the entire value of the property upon which it is laid. It is to be supposed that the members of the Legislature will exercise some wisdom in its acts; if they do not, the remedy is with the people. Frequent elections by the people furnish the only protection, under the Constitution, against the abuse of acknowledged legislative power.

All sorts of restrictions and regulations are placed upon the acquisition and disposition of property. What contracts are valid, and what are invalid, when they must be in writing, and when they can be made by parol, what is essential to transfer chattels, and what to convey realty, are matters of constant legislation. Some modes of acquisition are subject to licenses, and some are prohibited. The right to acquire property, like the use of it, must be considered in relation to other rights. It may be

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regulated for the public good, though thereby the facility of acquisition is lessened, as in the sale of gunpowder and drugs, and in the practice of different professions. Men have a right to the labor of their children or slaves, yet the Legislature may fix reasonable periods of labor, as is done in regard to children in factories, and in regard to slaves, in some instances. To say that a prohibition of work on Sunday prevents the acquisition of property, is to beg the question. With more truth it may be said, that rest upon one day in seven better enables men to acquire on the other six.

If it be admitted that the Legislature possesses the right to restrain each one in his freedom of conduct only so far as is necessary to secure protection to all others, from every species of danger to person, health, and property, no inference can be drawn against the validity of the act under consideration. The character and mode of protection, and what is dangerous to the person, or to health and property, must necessarily be left to its determination, and in the first section of the Constitution no inhibition to the exercise of its power in this respect can be found. The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted. The Legislature has so considered it, and the judiciary can not say that the Legislature was mistaken, and, therefore, the act is unconstitutional, without passing out of its legitimate sphere, and assuming a right to supervise the exercise of legislative discretion in matters of mere expediency. Such right, as I have already observed, does not belong to the judiciary. Its assumption would be usurpation, and well calculated to lessen the just influence which the judiciary should possess in a constitutional government.

"Questions of policy and State necessity," says Sedgwick, "are not to be assigned to the domain of the Courts; and I can not but think it unfortunate for the real influence of the judiciary that this authority has ever been claimed for them." (Interp. of Statutory and Cons. Law, 182.)

"We can not declare," says Mr. Justice Baldwin of the Supreme Court of the United States, "a legislative act void, because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but Courts can not assume their rights." (Bennett v. Boggs, 1 Bald., 74.)

I am of opinion that the "Act for the better observance of the

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Sabbath," is constitutional, and that the petitioner ought to be remanded.

### THRALL v. SMILEY *et al.*

In an action for an alleged libel, a variance between the date of the libel, as set forth in the complaint—the twenty-third of June—and the date as shown in the evidence—the twenty-fourth of June—is not material, unless the defence is misled by it.

To constitute a justification, in an action for a libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the facts detailed can only avail in mitigation of damages.

It is not error to exclude from the jury a diagram, where no drawing is necessary to illustrate the fact asserted.

Where the declarations of a party in a conversation are given in evidence, the whole conversation must be taken together, but the jury are not bound to give the same weight to all parts of it; they are at liberty to consider how much, under the circumstances, is entitled to credit.

Where a slip from a newspaper was handed by a deputy-sheriff to the jury, during the progress of the trial, containing matters relating to the trial, but not in evidence, and was perused by them, and the Court subsequently, upon discovery of the fact, instructed the jury that the slip was not in evidence, and that it should be wholly disregarded by them, and it appeared that the perusal could not, from the character of the matter contained in the slip, have prejudiced the losing party: *Held*, not to be a ground for a new trial.

The objection to the qualification of a juror, that his name was not on the venire returned by the sheriff, comes too late after verdict. The objection, if it had any validity, should have been urged at the trial.

The object of the law is to secure honest and intelligent men for the trial, and it is of no practical consequence in what order, or at what time during the term, they are summoned.

Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action for damages against the defendants for an alleged libel upon plaintiff, in his profession as a dentist. George W. Smiley, one of the defendants, applied to the plaintiff, Dr. H. H. Thrall, a dentist, to extract for him a tooth, which operation the latter undertook to perform. The tooth was a back molar, of the lower jaw. The tooth was so situated that the dentist deemed it best to draw it inwardly; and in performing the operation, the instrument came in contact with the cutting edge of the two upper and projecting front teeth, by means whereof they were broken on the under and upper side. The immediate cause of the accident does not appear, as no one was in the room at the time, and there was no positive testimony on the subject. A few days after the extracting of the tooth, there appeared in

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the San Francisco Evening Bulletin of the twenty-fourth of June, 1857, the following card :

"DR. H. H. THRALL, DENTIST.—The public are hereby cautioned against employing the professional services of the above-named individual, whom I hereby denounce as a miserable bungler, and a disgrace on the profession he presumes to follow.

"GEORGE W. SMILEY."

This card was published daily for one week, and also another one, of like import, about the same period in the Alta California, a daily newspaper. Thomas Smiley, brother of George, aided and counseled his brother in the publication of the card, and took a great interest therein. Thrall then instituted this action, laying his damages at \$10,000.

Thomas Smiley answered, denying the allegations in plaintiff's complaint. George Smiley answered as follows: "He admits that he wrote and procured to be published the two cards mentioned in the plaintiff's complaint in the several newspapers therein alleged, but he denies that he did so maliciously or with any other purpose than to warn the public of the true professional character of the plaintiff, and to prevent him from inflicting upon others in want of the assistance and professional services of a dentist, injuries of like character to those hereinafter stated to have been inflicted by said plaintiff upon this defendant." The answer then avers that this defendant, being induced by the advertised card of plaintiff as a dentist, applied to him to have a tooth extracted, and "that plaintiff so managed the said operation that by reason of his want of skill he broke and mutilated two of the front teeth of the defendant, to his great pain and damage, by reason of which this defendant was obliged to have the teeth, so mutilated, filed down, cut off and shortened," etc., "all of which was occasioned by the professional carelessness and ignorance of the plaintiff." The cards read in evidence were in the language of those set forth in the complaint, and the same which the defendant, George Smiley, admits to be true, excepting only a slight discrepancy of dates at the foot of one of the cards. The date of the card set forth in the second count of the complaint is the twenty-third of June, and that shown in evidence was the twenty-fourth of June. On the trial, on the examination of one of defendant's witnesses, at a point in his testimony where he was describing the injury to the defendant's teeth, a diagram of the teeth was shown the witness, which he said was a correct representation of the broken teeth before and after they were injured, and which drawing the defendants' counsel offered to exhibit to the jury. The Court refused to allow the same to be exhibited to the jury, and defendants excepted.

After the close of the testimony, the counsel of the defendants asked the Court to instruct the jury as follows:

"1. If the publication was made only for the purpose of giving notice to the community, and from good motives, and upon probable grounds, and reasons which you are satisfied from the evidence were good, and that there was good reason therefor, by reason of bad treatment to George Smiley, at the hands of the plaintiff, in performing the operation upon his teeth, and if you are satisfied that the defendants were not actuated by bad, malicious, or evil motives, but only to publish to the world what they believed to be the fact, the plaintiff can not recover.

"2. If the jury are satisfied that the plaintiff did do George Smiley an injury to his teeth, as alleged, in a bungling, grossly negligent, and unskillful manner, and the defendants were actuated only by good motives, they knowing that this plaintiff had acted in such an unskillful and grossly negligent manner, for the simple purpose of preventing other injuries of a like character being committed on other persons by the same party, the plaintiff can not recover; and

"3. In judging of the degree of skill of the plaintiff in this case, regard is to be had to the advanced state of the profession of dentists at the time, and if the plaintiff, in extracting the defendant's tooth, could have used an instrument less objectionable than the one used, and such instrument was in common use among the profession, it is *prima facie* evidence of a want of surgical skill on the part of the plaintiff in performing the operation."

Which instructions the Court refused to give, and the defendants' counsel excepted.

The Court instructed the jury that the answer of the defendant, George Smiley, did not amount to a justification of the alleged libel, as it did not aver the truth of the defamatory matter charged.

The plaintiff had judgment for \$3,500. The defendants moved the Court for a new trial, and amongst other grounds alleged the following: *first*, misconduct of the jury in the progress of the trial; and, *second*, disqualification of one of the jurors. The facts necessary to understand the points here raised, appear in the opinion of the Court. The motion for a new trial was denied, and the defendants appealed to this Court.

*Heydenfeldt and E. Cook* for Appellant.

1. The variance in the date of the alleged libel is fatal. The complaint purports to set out the libel in *hæc verba*. 1 T. R., 656; 1 H. Black., 49; 2 G. R., 491; 1 C. Plead., 257; 2 Price R., 189; 1 Star Ev., 385.

In the description of libels or other written instruments which are set out according to their tenor, every part necessarily oper-

ates by way of description of the whole, for the libel alleged can not be the same with that proved when they vary as to any part, however unimportant. 1 Greenlf. Ev., § 58. "Dates, etc., must be precisely proved." 10 Ver., 410; 20 Vermont.

In attempting to recite a writing in *hæc verba*, the pleader must be holden to great strictness. If there is but the omission or substitution of a single word, there is a variance. The writings are not the same.

Action in the case for libel, the greatest strictness required when the count is in *hæc verba*. 2 Tyler Rep., 148, Olive v. Chipman. Words and figures require exact coincidence of language. Com. v. Stow, 1 Mass. Rep., 54. Date or time of a record must be literally proved. 3 Wash. C. C. Rep., 31, 41.

Jones v. Cook, 1 Cow. 313, shows that the same exactitude obtains in New York. The execution is not set out in *hæc verba*. The plaintiff is not bound to prove immaterial matter, unless set out in this manner in his pleadings. 1 Cow. & Hill's notes, p. 683, note 376.

2. The Court erred in not allowing the witness to exhibit to the jury a drawing of the teeth, showing their condition both before and after the breakage.

3. As to the paper improperly given to the jury by the officer. Such evidence so improperly before the jury, is ground for a new trial. 5 Mass., 405; 5 Pick., 296.

4. As to the question whether the defendants are precluded by not having objected to the juror, when they were ignorant of his disqualification, vide King v. Trueman, 3 Barn. & Cress., 452; Jordan v. Meredith, 1 Birm., 27; Commonwealth v. Stowell, 9 Met. Rep., 572. The *scienter* on the part of the defendant as to the fact constituting error, is assigned as the ground of judgment. 17 Ala. Rep., 434.

5. The Court erred in refusing to instruct the jury as requested.

6. The Court erred in charging the jury that the defendant, George Smiley, had not justified by his answer.

The Court, therefore, took from the jury the power of deciding whether, upon the evidence, the plaintiff was or was not a bungler in his profession.

The jury may well have said, from the character of the operation upon Smiley's tooth, that Thrall was a bungler in his profession.

The Court then, in substance, told the jury that unless Smiley could prove that Thrall was a bungler, generally, in his profession, and never extracted a tooth properly, they must find for plaintiff.

*S. M. Bowman* for Respondent.

I. Variance between the libels set forth in the complaint and the card shown in evidence.

The answer of Thomas Smiley, being a general denial, it became necessary for the plaintiff, in order to connect him with the libels in question, to prove at the trial they were published at his instance and request, and that he declared himself to be the author of them. So far as his co-defendant was concerned, his answer admitted the allegations of the complaint in that regard, and it was not necessary, nor was any evidence offered to fix him as having made the publications.

The cards offered were in the precise language of those set forth in the complaint, and exactly the same which George Smiley admits to be true, excepting only a slight discrepancy of dates at the foot of the cards, which constitute no part of the slanderous words.

Is this discrepancy of date material? Was the defendant objecting injured by it? These are the tests by which the validity of the alleged error must be tried.

It is frankly admitted that cases may be found, especially in the old reports, in which a very rigid rule has been maintained in regard to variance, so much so, that the dotting of an *i* and the crossing of a *t* have been held to be material. But, as was truthfully remarked by the Court below, on this point, in refusing a new trial, "for a long time, the Parliament of Great Britain, and the Legislatures of the States of the Union, have, by statutory enactments, endeavored to compel the courts to disregard variances of this kind, where no injury can result to the party objecting, and of late years the Courts are becoming more liberal in carrying these beneficent provisions into effect."

And the citation of a few cases will show how reluctantly Courts acknowledged the supremacy of the rule, even before the recent statutes.

"Small variance—as if the declaration on a bill is, *that he will pay*, and the bill says, *if he will pay*, the variance is immaterial." 5 Com. Dig. B. 4.

In 2d Salk., 659, the deed declared on was dated the thirtieth of March, *Anno Domini* 1701; the oyer was thirtieth of March, 1701, and held no variance.

See, also, *Henry v. Brown*, 19 Johns. R., 49; *Emery v. Merwin*, 6 Cow., 360; *Janson v. Ostrander*, 1 Cow., 685; *Commonwealth v. Bailey*, 1 Mass., 62; *Allen v. Jarvis*, 20 Conn., 38.

It was argued against us, on the motion for new trial below, with much apparent zeal, that the Legislature of this State had repudiated the modern doctrine of variance, and had wholly omitted in our Practice Act to enact the one hundred and sixty-ninth section of the New York Code, although the Code was imitated in almost every other respect, and it has hence inferred we

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are remitted back to the old common law rule of technical variance.

But it is a mistake to suppose the Legislature has repudiated this doctrine. On the contrary, it has in another section of our Practice Act provided for the same evil in a different way :

“No exception shall be regarded on a motion for a new trial, or on appeal, unless the exception be material, and affect the substantial rights of the parties. Prac. Act, § 188.

II. The Court below did not err in refusing to allow a drawing to go to the jury, showing the teeth both before and after they were injured.

The testimony offered was immaterial. It was not a case in which engravings or drawings would be necessary to communicate the facts intended. It was not an action of ejectment, in which a survey and plat, by an authorized surveyor, would be admissible to show boundaries. It was not a case of patent right of some complicated machinery, where a drawing might be useful to show the exact infringement complained of. Nor was the witness an expert, called upon to demonstrate some scientific fact not understood by common minds, wherein drawings might be useful to illustrate such fact. He was not deaf and dumb, that signs and pictures were necessary for the communication of his ideas. The picture was not even made by the witness. It was partial, showing only two teeth, disconnected from the other teeth. It was only calculated to deceive and mislead the jury. Besides, the dentist who examined the teeth immediately afterwards, and who repaired them, was on the witness-stand; and the defendant was also in Court, and exhibited his teeth to the jury for their actual inspection. This was better evidence than any mere picture, which, from the very nature of things, could not be accurate. And if the engraving was not admissible, because of its immateriality and deceptive character, in the very nature of things how could it be expected the witness could make it better with a piece of paper and pencil?

III. But it is said the jury were guilty of misconduct, and a new trial should have been granted on that account.

The misconduct complained of consists in the fact that the jury saw and read a certain card, which had been published in the newspapers, signed by the principal dentists of San Francisco, showing the plaintiff stood high in his profession among his professional brethren. The card complained of, was on a printed slip, cut from a newspaper, and contained at the top, first, the libel sued for; next, the dentists' card, which had been reproduced and republished by George W. Smiley, and next, an additional card of his own, in which he attempted to counteract the beneficial result which might accrue to the plaintiff from a testimonial so complimentary as the dentists' card. The lower card contained exaggerated cuts of defendant's teeth “both be-

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fore and after the accident," similar to that rejected as evidence. The slip was taken by the bailiff from the table of defendants' counsel, and by him handed to one of the jury. It can be seen at a glance, the paper could only prejudice the plaintiff. The plaintiff's counsel, on observing the jury examining the slip, called the attention of the Court to the fact, and the Court, at his request, ordered the jury to hand it back to the place where it came from, and charged them that it was not evidence, and that it should be wholly disregarded by the jury.

Besides, the dentists' card and its contents had been mentioned by every dentist who testified at the trial, without objection, and the jury knew as much about it before they saw it, as they did afterwards. So that it is hard to perceive how, under any circumstances, the appellants were injured in the premises. *Peacham v. Carter*, 21 Vt., 515.

IV. Wm. H. Kirby, one of the jurors who tried the cause, was not disqualified to act as such.

The alleged disqualification consists in the fact that he was not on the *venire* returned by the sheriff. It seems, however, he was summoned, and his name regularly entered on the minutes by the clerk, at the commencement of the term; that he appeared and answered when his name was called, and was ordered to take his seat in the jury-box, and that no objection was made by defendants when the case was tried.

The answer to appellants' ground is, that the objection comes too late after verdict. If it has any validity, it should have been urged at the trial. A party can not be allowed to quietly lay by, and carelessly accept a jury, and then go on to trial, taking his chances of a verdict in his favor, and, when finding it adverse, turn round and say, "there was a juror on the panel who was not regularly served, and for that reason must have a new trial." If such a rule prevailed, there would be no telling when a cause is tried, and Courts would be called upon to set aside verdicts and try causes over and over again without end; for it is seldom the law is strictly complied with in selecting juries. The statute is merely directory. The object of the law is to assemble together a number of suitable citizens out of which may be selected juries to try causes. The parties who have causes to be tried seldom take the trouble to inquire into the regularity of the steps taken, in procuring the attendance of these gentlemen. It is enough for them that a sufficient number of good men are in Court to constitute the jury. But if so disposed, the time to inquire into any such irregularity is when these gentlemen are arrayed before the parties for their challenge. And if a party fails to inquire, and omits to object to a juror at this time, he waives the irregularity, and can not afterwards object. *Page v. Inhabitants of D.*, 7 Metcalf, 327; *Cole v. Perry*, 6 Conn., 584; *Greenup v. Stoker*, 3 Gilman, 202; *People v. Ransom*, 7 Wen.,

421; *Munroe v. Brigham*, 19 Pick., 368; *Presbury v. Commonwealth*, 9 Dana, 203; see, also, Summary of Eng. and Am. Authorities in *Graham's Practice*, 747-8.

It is not pretended the juror was there at the instance or procurement of plaintiff, or that he was tampered with; nor does the affidavit of defendants show their counsel were not aware of the irregularity complained of, nor does it appear how or wherein they were injured. Even in a criminal case this must be shown affirmatively. For the necessity of showing counsel ignorant of the alleged fact, see *Anderson v. State*, 14 Geo., 709.

FIELD, J., delivered the opinion of the Court—BURNETT, J., concurring.

This is an action for an alleged libel upon the plaintiff in his profession as a dentist. The variance between the date of the libel as set forth in the second count of the complaint—the 23d of June—and the date as shown in the evidence—the 24th of June—was immaterial. The defendants were not misled by it; at least they do not pretend they were misled. If they were prejudiced by it they should have shown to the Court in what respect, to entitle the objection to consideration.

The answer of the defendant, George Smiley, does not contain a justification of the publication. To constitute a justification, the answer should have averred the truth of the defamatory matter charged. It was not sufficient to set up facts which only tended to establish the truth of such matter. The averment of its truth was essential, without which, the facts detailed could only avail in mitigation of damages. (Practice Act, § 63.) The injury received in the operation described by the defendant, may have been occasioned by the unskillfulness of the plaintiff; still, under the answer, it could not justify the sweeping denunciation that he was "a miserable bungler, and a disgrace" to his profession.

There was no error in excluding from the jury the diagram exhibiting the condition of the teeth of the defendant, George Smiley, both before and after they were injured. This is not a case in which a drawing was necessary to illustrate the fact asserted. The extent of the injury to the two front teeth could be as well understood from the statement of the dentist who repaired them.

The instructions requested by the defendants were properly refused. The first three are based upon the idea that the answer amounted to a plea of justification. The motives with which the publication was made, and the unskillfulness of the plaintiff exhibited in his operation, could not defeat a recovery under the answer; they were facts to be proved in mitigation of damages. The fourth instruction requested is covered by the charge of the Court, which states with accuracy the rule as to

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the declarations of the defendants. The whole conversation was to be taken together, but the jury were not bound to give the same weight to all parts of it; they were at liberty to consider how much, under the circumstances, was entitled to credit.

The motion for a new trial was urged on the ground of misconduct of the jury in the progress of the trial, and the disqualification of one of the jurors. The alleged misconduct consisted in the perusal of a slip from a newspaper containing the libel upon which the action is brought, a card signed by several dentists of San Francisco, recommending the plaintiff as a careful and competent operator, and a second card by the defendant, George Smiley, exhibiting a drawing of his teeth before and after they were injured. The slip was taken from the table of the defendants' counsel, and handed to the jury by the deputy-sheriff. Immediately upon its discovery, the plaintiff's counsel called the attention of the Court to the fact, and by its order the slip was returned to the defendants, and the jury were instructed that it was not in evidence, and should be wholly disregarded. The perusal of the slip was highly improper, but it could not have prejudiced the defendants. The libel was already in evidence; the dentists' card had been mentioned by several of the witnesses without objection, and the jury were informed of its character and contents; and the second card of the defendant, George Smiley, contained a drawing similar to the one offered by his counsel, and excluded by the Court. The plaintiff was the only party who had a right to complain of the conduct of the jury.

The alleged disqualification of one of the jurors consists in the fact that his name was not on the *venire* returned by the sheriff. It appears, however, that he had been summoned at the commencement of the term, and that his name was entered on the minutes, and placed in the box, and drawn for the trial in the same manner as the other jurors were drawn. The objection, if it had any validity, should have been urged at the trial; it comes too late after verdict. The object of the law is to secure honest and intelligent men for the trial, and it is of no practical consequence in what order, or at what time during the term, they are summoned. It would be productive of great hardship to permit a second trial upon a ground so technical and unsubstantial. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. (*King v. Hart*, 4 Barn. & Ald., 430; *United States v. Gilbert*, 2 Sum., 19; *People v. Ransom*, 7 Wend., 417; *Ambush v. Hadley*, 4 Pick., 38; *Commonwealth v. Norfolk*, 5 Mass., 435.)

In *Page v. Inhabitants of Danvers*, (7 Metcalf, 327,) it was objected that certain of the jurors who sat in the case were not selected in conformity with law, and were not qualified to act, and

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that this fact the parties had for the first time learned since the trial and decision; but the Court, per Shaw, C. J., said, "If there was any irregularity in the manner of selecting the jury, and if this would have been good ground of exception, if seasonably taken, still it came too late, after proceeding to trial. The ground is, not that the jurors were interested or prejudiced, or otherwise personally improper, but that there was a mere irregularity, not apparently affecting the merits. Such an objection, if available at all, must be seasonably taken. This results from strong considerations of policy and expediency, rendering it an imperative rule of practice."

Judgment affirmed.

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LOW *et al.* v. HENRY *et al.*

An attachment, issued before the issuance of the summons in the suit, is void, and the subsequent issuance of the summons cannot cure it.

*Per Burnett, J.*—A deed and defeasance, to constitute a mortgage, must be between the same parties.

Parol evidence is not admissible to show that a deed, absolute on its face, was intended as a mortgage, except in cases of fraud, accident, or mistake in the creation of the instrument itself.

In the absence of a mutuality of obligation, it must appear by apt and express words in the instruments, that it was the intention of the parties that the transaction should amount to a mortgage.

The judgment in an attachment-suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

A statement of the facts appears in the opinion of the Court.

*Stephen J. Field* for Appellant.

This is a suit in equity to perpetually enjoin the defendants from selling certain real estate situated in Marysville, belonging to the plaintiffs, under executions issued upon judgments recovered against Adams & Co. The judgments are entered up so as to be enforced against the joint property of Adams, Woods, and Haskell, and the separate property of Adams and Woods. *Prac. Act.*, § 32; *Shattuck v. Carson*, 2 Cal., 589; *Bank of U. S. v. Schulze*, 2 Ohio, 471; *Norton v. Curtis*, 5 Hammond, 178; *Pettite v. Shephard*, 5 Paige, 501.

The plaintiffs deraign their title from Eaton and Babb, who owned the premises in question in February, 1853, when they sold and conveyed them to Haskell.

In May, 1854, Haskell executed a conveyance of the premises to Adams, which, though absolute on its face, was intended as

security for \$21,000, a sum then loaned by Adams to Haskell and his partner Woods, or which at the time they owed Adams, and took from Adams a bond of defeasance, or contract to convey the premises to Haskell and Woods upon the payment of \$22,050, which is the sum loaned and interest to the day of payment. The deed and bond of defeasance were both recorded in the office of the recorder of Yuba County, the bond in the book called "miscellaneous records." These two instruments, the deed and bond, constitute a mortgage, at least it is so alleged in the complaint, and, for the purposes of the demurrer, the allegation must be taken as true. The fee, then, was in equity in Haskell, whilst Adams possessed a mere mortgagee's interest.

The plaintiffs have a conveyance of the fee from Haskell, and also an assignment of the bond of defeasance executed by Adams to Haskell and Woods, and a deed from Adams in pursuance of the condition of the bond; *i. e.*, they have in fact the mortgagor's title, with a discharge of the mortgage.

The defendants issued attachments against Adams, Haskell, and Woods, and attached their interest in the premises, and have recovered judgments in their attachment-suits which authorized a sale of the joint property of Adams, Haskell, and Woods, and the separate property of Adams and Woods. They have no judgment authorizing a sale of any individual property of Haskell. If, then, the premises in question were in fact the separate property of Haskell, the defendants have no right to proceed and sell the same.

The question then is, can a mortgagee's interest be attached in a suit, and, upon a recovery of a judgment, be sold on execution.

The defendants admitted, on the argument in the Court below, and it must, being alleged in the complaint, be taken as true for the purposes of the demurrer, that as between the parties Haskell and Adams, the latter had only a mortgagee's interest; but they contend that there was no authority for recording the bond of defeasance in the miscellaneous records, and therefore such record did not operate as notice, and, in consequence, their attachment against Adams holds the premises as though they were owned in fee-simple by him.

I am willing to admit, for the purposes of this argument, that there was no record of the bond of defeasance, and that the only record was the deed to Adams. There was no law in existence until 1855, authorizing the record of such a bond, and therefore, whether recorded or not, is of no consequence. But supposing there never had been any bond of defeasance, still the deed would be none the less a mortgage in equity, if given, as alleged in the complaint, as security for money loaned at the time or for a past indebtedness, and Adams' interest would still have been a mere mortgagee's interest.

Kent, in his Commentaries, vol. 4, p. 142, says: "A deed absolute on the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case though the defeasance was by an agreement resting in parol; for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud, surprise, or mistake."

Mr. Justice Story, in *Taylor v. Luther*, 2 Sumner Rep., 233, quotes the above passage from Kent with approbation, and adds:

"It is the same if it be omitted by design, upon mutual confidence between the parties; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience and justice. I do not comment on the subject at large, because it seems to me wholly unnecessary, in the present state of the law, to do more than to enunciate the principles which govern cases of this nature, and which are as well established as any which govern any branch of our jurisprudence." *Jennings v. Eldridge*, 3 Story Rep., 293; *Clark v. Henry*, 2 Cowen, 332; *Van Buren v. Olmstead*, 5 Paige, 10; *Lane v. Shears*, 1 Wend., 437.

In *Miller v. Thomas et al.*, 14 Ill., 431, Caton, J., of the Supreme Court of Illinois, says: "It is by no means necessary, in order to constitute a mortgage, that the deed and defeasance should be contained in the same instrument, or that they should even refer to each other. Their connection may be shown by parol. Indeed it is not absolutely necessary that the defeasance should be in writing at all. The conveyance may be absolute on its face, and yet it may be shown, by parol, that it was intended only as a security for the payment of money, when it will be treated in equity as a mortgage. These principles are too familiar to require authorities for their support."

In *Miami Exporting Co. v. Bank U. S. et al.*, *Wright's R.*, 252, the Supreme Court of Ohio says:

"It is now the acknowledged doctrine, that parol evidence is admissible against the face of a deed, to show that a mortgage only was intended. And whether a conveyance be a mortgage or not, is determined by its object. If given as a security, it is a mortgage, whatever be its form. This is so, whether the condition of defeasance form a part of the deed, is evidenced by other writing, or exists only in parol. The fact of its being given as security, determines its character, not the evidence by which the fact is established."

The parol evidence is admitted, not for the purpose of contradicting or varying the deed, but to show the real character of the transaction as one of loan, and not of purchase, and thereby establishing an equity which will control the operation of the

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instrument. *Banks et al. v. Sprigg*, 1 McLean, 183; *Miami et al. v. Bank*, Wright's Rep., 252.

The mistake the defendants make, is this: They consider the Registry Act intended to protect attaching-creditors, whereas it was only intended to protect subsequent purchasers and mortgagees in good faith, and for a valuable consideration.

The twenty-sixth section of the Act Concerning Conveyances reads as follows: "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first recorded."

The protection of the Registry Act can not be invoked until a sale has been made or a mortgage given. It in no way, directly or indirectly, applies to attaching-creditors previous to a sale under the judgment. Had a sale taken place, and the defendants become purchasers, without any notice, actual or constructive, then they might have invoked the protection of the Registry Act. They could then have said that they had parted with their money upon the faith of the Registry Act. To prevent this very state of things, is the object of the present action.

Until a sale, the defendants have not lost anything. They had no lien previous to the attachment; and if Adams possessed no attachable interest in the property, they acquired none by their attachment. *Rose v. Munie*, 4 Cal., 173.

In reference to the deed and bond, we find: *first*, that they were both executed at the same time; *second*, that they were both witnessed by the same person; *third*, that they were both acknowledged before the same officer; *fourth*, that they both describe the same property, making the same mistake in the description in each instrument; *fifth*, that the bond provides for the payment of \$22,050, on November 11, 1854, which is the same amount specified as the consideration of the deed, with interest added thereto, at ten per cent. a year, from date of deed, viz., six months; *sixth*, that both of the instruments were sent to C. B. Macy, and filed by him for record at the same hour; and *seventh*, the bond provides that until the conveyance is made to Haskell and Woods, they are to hold and use the premises without the payment of rent.

In *Kerr v. Gilmore*, 6 Watts Penn. Rep., 409, the Court in giving its opinion says: "When the deed and defeasance are of separate and different dates, they may amount to a mortgage, and nothing more; when they are of the same date and executed at the same meeting of the parties, before the same witnesses, they must be a mortgage, or there will be no more mortgages."

In the case at bar, the interest of six months is included in the gross amount to be paid; it is the same as if the

bond stated the original amount with interest. One of the circumstances tending to show that a conveyance is intended as a mortgage, is the possession of the premises by the grantor. In the present case, Haskell is the grantor, and the bond of Adams provides that Haskell and Woods shall have the use of the premises without the payment of rent, until a conveyance is executed to them by Adams. It is hardly reasonable to suppose that Adams would allow the use of premises of the value of \$21,000, owned by him absolutely, without any charge. Treating the two instruments as together constituting a mortgage, and the provision in the bond is at once explained. Hilliard on Mortgages, vol. 1, 64.

The fact that the bond provides for a conveyance to Haskell and Woods, instead of Haskell alone, can not affect the character of the instruments. When a deed is executed as security for a debt, the grantor may provide by a separate instrument that the re-conveyance be made to a third party, or back to himself, upon the payment of the debt. In either case, the two instruments together constitute only a mortgage. See *Flagg v. Mann et al.*, 2 Sumner, 540.

But supposing the bond of defeasance be laid entirely out of consideration, still it may be possible for the plaintiffs to prove either by parol, or by documentary evidence, the allegation in their complaint, that the deed from Haskell to Adams was executed as security for money loaned at the time, or for a past debt. The fact alleged is one that may be proved; whether the plaintiffs will be able to make such proof, is another matter, but if proved, it renders the deed, though absolute on its face, a mortgage in equity. The fact then being taken as true, by the demurrer, it follows that the interest of Adams is to be treated in the decision of this appeal as a mere mortgagee's interest.

If the views I have advanced be correct, the demurrer falls, for if Adams was a mortgagee he had no interest in the premises which were the subject of attachment, or of sale, under execution, and the sale advertised by the defendants on the executions issued upon their judgments, if allowed to take place, would only throw a cloud upon the title of the plaintiffs, and subject them to vexatious, harassing and expensive litigation, and from such sale the defendants should be perpetually enjoined. *Smith v. People's Bank*, 24 Maine, 185; *Drake on Attachment*, 229; *Bryan v. Sharp*, 4 Cal., 349.

*Charles Lindley* for Respondents.

1. The bond from Adams to Haskell and Woods does not import to be connected with the deed, and form a part of the same transaction, or contract. In order to make different instruments constitute one transaction, they must embrace the same subject, and be between the same parties. The consent or agreement of

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each must extend to and run through each part of the contract so united. All the parties must enter into all the parts.

Adams and Haskell are parties to one branch—the deed; and Adams, Woods, and Haskell, are parties to the other branch—the bond. Woods is a stranger to the deed. How can he be connected with it? How can the two instruments be put together and make one transaction unless Woods is party to the deed?

The case of *Treat v. Strickland*, 23 Maine, 237, is precisely similar to the case at bar on the point of same parties; and the bond was held to be an executory contract to convey. In no case can the relation, or connection, be implied from coincident circumstances, when no reference is made in either instrument to the other—no recital that a deed has been executed; or that the grantor shall refund the purchase-money, with interest, or expenses, or some like words of reference and connection. In support of the argument on this point, the Court is respectfully referred to the fact of every case cited on either side upon the subject of defeasance, especially *Kerr v. Gillman*, 6 Watts., 405; *Baker v. Thrasher*, 4 Denio, 493.

2. Should the Court be of opinion that the two instruments constitute but one transaction, it must be a conditional sale;—a sale to Adams, with a right reserved to Haskell, with Woods, to purchase or re-purchase the estate, according to the terms of the bond. *Baker v. Thrasher*, 4 Denio, 493; *Holmes v. Grant*, 8 Paige, 254; *Eckford's Executors v. DeKay*, 6 Wend., 29; *Glover v. Payn*, 19 Wend., 518; *Slee v. Manhattan Co.*, 1 Paine, 56; *Goodman v. Greenan*, 2 Ball and Beatty, 274; *Conway v. Alexander*, 7 Cranch, 237; *Robinson v. Crapsey*, 2 Edw., V. C., 138; *Robinson v. Crapsey*, 6 Paine, 480; *Flagg v. Mann*, 14 Pick., 467; *Brown v. Dewey*, 2 Barb. Ch., 28; *Sumner*, 534; 4 Kent, 8 Ed., 148, and note; *Treat v. Strickland*, 23 Maine, 237; *Brown v. Dewey*, 1 San. Ch., 56, cited as a leading case in notes to 4 Kent, 8 Ed., 146, is overruled in 2 Barb. Sup. Court, p. 28.

In *Glover v. Payn*, above cited, Bronson, J., held: "Judging from the papers themselves, this was simply a sale of land for a consideration paid at the time, with the agreement to re-sell at a future day at an advanced price, *the re-sale to depend upon the election of the original grantor.*" These words are italicised to show their applicability to the case at bar.

Chief Justice Marshall, in 7 Cranch, above cited, says: "To deny the power of two individuals, capable of contracting for themselves, to make a contract for the purchase and sale of lands, defeasible by the payment of money at a future day, would be to transfer to the Courts of Equity in a considerable degree, the guardianship of adults, as well as of minors."

The bond is not, *per se*, a defeasance, and consequently the transaction, taken together, is not a mortgage.

Jacobs' Law Dictionary, vol. 2, title "*Defeasance.*" "To make

a good defeasance, it must be, first, by deed, (in case of an endorsement, by deed poll,) for there can not be a defeasance of a deed without a deed. Second, it must recite the deed it relates to, or at least the most material part thereof, or in case of endorsement, refer thereto. Third, *it is to be made between the same parties that were parties to the first deed*. Fourth, it must be made at the time or after the first deed, and not before. Fifth, it ought to be made of a thing defeasible." Just. 1, 236; 3 Ser., 234.

Judge Kent, in 4 Kent Com., (8 Ed.,) 144, speaks of defeasance as follows:

"The consideration upon which land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument. And, if the deed be absolute in the first instance, and the defeasance be executed subsequently, it will relate back to the date of the principal deed, and connect itself with it, so as to render it a security in the nature of a mortgage."

The essence of the defeasance is that it defeats the principal deed.

If it is a mortgage, the equity of redemption is indispensable. In whom does it exist? In Haskell? or in Woods and Haskell?

Suppose the money, \$22,050, had been paid to Adams on this contract with Woods and Haskell, would the deed from Haskell to Adams be void? be defeated? and the legal title revert at once to Haskell? No—for it is agreed that Adams shall make title to Woods; and the deed from Haskell to Adams must remain valid and effectual, for upon it Adams is to make title to Woods.

After the payment of the money, the \$22,050, on the contract to convey, could not Woods have had his action for a specific performance against Adams? Certainly. Then, how can the title revert to Haskell? How can Haskell's deed be defeated by the payment of the money?

Hence the rule that all the books lay down that the defeasance must be between the same parties who appear in the deed.

Could Haskell, as a mortgagor, redeem, so as to defeat Woods? No. See the several cases above cited. The proposition contended for is too apparent, from the face of the papers, to need further argument.

3. The case must be determined from the bond and deed alone, for the allegations in the complaint show no defeasance other than the one set forth, namely, the bond.

From the allegations in the complaint, it is clear the question must be determined upon the deed and bond, exclusive of the preceding general allegations, which are made in view of, and introductory to, the specific showing of the bond as a defeasance.

Such is the fair import and construction of the complaint, and the apparent intention of the pleader. The appellants' counsel

proposes, in his argument, to leave the bond out of the consideration of the case, and to look to the general allegations that the deed was given as security, treating these allegations as a sufficient foundation for showing defeasance other than the bond.

Reserving, for the present, the question whether a parol defeasance of an absolute deed may be shown in cases free from actual fraud, it seems clear that when such defeasance, or contract claimed as a defeasance, is reduced to writing, and shows that all the allegations, contravening the legal import of such writing, are futile, there is no foundation for proof, especially where such allegations are not directed to the defeasance, but to the deed. There is no case, rule, or *dictum*, which allows a written instrument, claimed as a defeasance, to be varied, contradicted, or impeached, unless there be actual fraud or mistake in its execution; and then, such facts must be fully pleaded of and concerning such defeasance, and not of the deed. Possibly, an absolute deed may be defeated by parol, but a deed, claimed as a defeasance, can not be. It is alleged that the deed was given as a security, and not that the bond was given as a defeasance to the deed, but that the bond *per se* operates as a defeasance.

If they claim, *ore tenus*, that the defeasance was in parol, they show in the complaint that it was in writing, or that a writing was executed at the time embracing the subject-matter, and it must be conclusive.

There must be some point beyond which Courts of Equity will not go, in overthrowing the Statute of Frauds and the certainty and security of written instruments.

The bond confirms the absolute estate in Adams. Haskell is estopped from setting up an equity of redemption, by accepting from Adams the bond to convey to Woods and Haskell, containing, in terms, a lease to them of the premises till the eleventh of November, 1854. *Murphy v. Barnett*, 1 Law Rep., 106; 5 Hammond, 194; 7 Hammond, 227; Harr. Ch., (Del.) 414; 6 Hammond, 87; 1 Greenl., §§ 22, 24, 211; 2 Cal. Rep., 558.

The true test of the question is this: Could Adams have set up, as a defence to an action by Woods, for specific performance, the fact that the deed was a mortgage, the bond a defeasance, and that the property reverted to Haskell on the payment of the \$22,050? If the deed be a mortgage, then Haskell's right of redemption is an inseparable incident. 1 Greenl. Cruise and Dig., tit. 15, cap. 1, § 21. What becomes of Woods' interest in the contract? Who is to release Adams from his bond to Woods? Woods has no remedy against Haskell, for he has no contract in writing for the conveyance of the land from Haskell.

4. Should the Court be of opinion that the appellants are not concluded by their showing of the bond, in the manner set forth, and that the complaint can be considered independent of the

bond, with a view of showing other defeasance, then there are two insurmountable objections to its sufficiency.

By the sixth section of our Statute concerning Fraudulent Conveyances, Comp. Stat., p. 200, "No estate or interest in lands, nor any power or trust over or concerning lands, or in any manner relating thereto, shall be created, except by writing, or operation of law." *Lee v. Evans*, Oct. Term, 1857. The words "in any manner relating thereto," are intended to cut off all parol transactions. This language is stronger than, and unlike that of, any other statute.

Upon this subject, see the English Statute, quoted in 2d Story Equity Ju., fol. 70.

Whenever Courts of Equity, yielding to views of apparent oppression in individual cases, have made exceptions to the old statute, the sober, settled judgment of jurists has disapproved them; and not unfrequently is legislation invoked to remedy the evil.

The peculiar phraseology of our statute was intended to cut off all equitable mortgages. It is submitted, that at least under our statute, and in view of the policy of upholding it, the defeasance must be in writing, unless there be fraud or mistake in the execution of the deed. If this position be correct, then it follows that the complaint is insufficient, (considered independent of the bond,) in this, that it does not allege any other defeasance in writing. Not only does the Statute of Frauds require this, but the familiar rule of law, that a written contract can not be varied by parol, except in cases of fraud, accident, mistake, or surprise, requires that any variation, or contradiction, of such contract, other than for the causes above named, must be in writing. *Kelly v. Bryan*, 6 Ired. Eq., 283; 1 John Ch. Rep., 429; 1 Hill, 606; 6 Hill, 219; 1 Greenl. Ev., §§ 275, 278; 2 Story Eq., Jur., § 1531; 2 Starkies' Ev., pp. 544, 577; *Thomas v. McCormick*, 9 Dana, 108; *Woodard v. Fitzpatrick*, 9 Dana, 118.

As to the specific question whether a clear, absolute deed can be defeated by secret agreement, in parol, in cases free from actual fraud in the execution, there being no collateral agreement in writing referring to the deed, we answer confidently, no; and the facts of every case examined confirm the answer, although, in some cases, there may be *dicta* which, at first, appear to be the reverse.

The true rule, carefully drawn from all the cases, appears to be this: Where there is an ambiguity, patent upon the face of the instrument, or upon the face of an absolute deed, considered in connection with, and as part of, other instruments between the same parties, and as part of the same transaction; then, upon sufficient allegations, a parol-showing to explain such ambiguity, may be made, and in cases of great doubt, as to what was the intention, the transaction should be considered as a mortgage.

All other parol-showing must be referred to the head of actual fraud, surprise, or mistake. *Lee v. Evans*, 8 Cal., 424.

BURNETT, J.—This was a bill to restrain the sale of certain premises on executions issued out of the District Court. The defendants demurred to the complaint; the demurrer was sustained, and the plaintiffs appealed. The facts alleged in the complaint were, concisely, these:

1. On the eleventh of May, 1854, Daniel H. Haskell conveyed the premises in dispute, by deed, to Alvin Adams, which deed was recorded May 16, 1854. This deed was absolute on its face, and recites a consideration of \$21,000.

2. Upon the same day, Alvin Adams executed his bond to Daniel H. Haskell and Isaiah C. Woods, in which he binds himself to do two things—*provided* said Woods and Haskell should pay him the sum of \$22,050, on or before the eleventh day of November, 1854—namely: *first*, to convey to them the same premises by warranty-deed; *second*, to permit them, in the meantime, to occupy the premises free of rent.

3. That Haskell conveyed the premises to plaintiffs August 9, 1855, which deed was recorded September 1, 1855; and that plaintiffs then took possession of the premises, and have always had possession since that time.

4. That on the ninth of August, 1855, said Woods and Haskell assigned the bond of Adams to the plaintiffs, which assignment was recorded September 6, 1855.

5. That Alvin Adams, by deed delivered August 28, 1855, conveyed the premises to plaintiffs, which deed was recorded August 31, 1855.

6. That defendant Henry, on the twenty-sixth day of May, 1855, sued Adams & Co., and attached the premises in controversy; that the attachment was issued before the summons; that judgment was had September 3, 1855, for \$5,907 69, to be enforced against the joint property of all the defendants and the individual property of Woods; that afterwards proceedings were had, whereby, on the thirteenth of May, 1856, it was adjudged that the judgment be enforced against the separate property of Adams.

7. That the defendant Kinder sued Adams & Co. June 2, 1855, attached the premises June 4, 1855, and obtained judgment January 23, 1856, for \$3,341 60, so that it might be enforced against the joint property of all the defendants, and the separate property of Woods and Adams.

8. That Philip Schover sued Adams & Co., and attached the property June 20, 1855, and obtained judgment January 23, 1856, for \$2,940 25, so that it might be enforced against the joint property of all, and the separate property of Woods and Adams.

9. That defendant Young sued Adams & Co. June 26, 1855, and

attached the property and obtained judgment March 19, 1856, for \$996 50, so that it might be enforced against the joint property of all, and the separate property of Wood and Adams.

10. That executions have been issued upon these four judgments, and delivered to the sheriff, who has levied upon the property and advertised the same for sale.

Conceding that the title to the premises in controversy was in plaintiffs at the date of the levy of the several executions, there can be no question as to their right to restrain the sale. (5 Page, 493; 5 Hammond, O. R., 178; 2 Ohio R., 471.) It is equally clear that if the title was in Adams & Co., or in Adams, at the time the attachment was levied, the complaint could not be sustained, unless the liens of the attachment were subsequently lost.

There are three questions involved in the case:

1. Whether the transaction amounted to a mortgage or a conditional sale.

2. Whether the liens of the attachments were lost in consequence of the form in which the judgments were taken.

3. Whether the attachment in the case of Henry v. Adams & Co. was void.

In the case of Lee v. Evans, decided at the October Term, 1857, we held that parol evidence was not admissible to show that a deed, absolute upon its face, was intended as a mortgage, without alleging and proving fraud, accident, or mistake, in the creation of the instrument itself. That case was well considered; and we have since seen no reason to change our opinion. In considering the first question, we must, therefore, collect the intention of Adams, Woods, and Haskell, from what they have deliberately stated in the written instruments, and hold them to have meant what they said.

It is insisted by the learned counsel of plaintiffs, that the deed from Haskell to Adams, and the bond from Adams to Woods and Haskell, constituted but parts of the same instrument, and must be taken and construed together; and that when so construed they amount to a mortgage, and no more. These instruments bear date the same day, were witnessed by the same person, acknowledged before the same officer, intrusted to a mutual agent, and describe the same property. When two instruments are executed at the same time, between the same parties, and about the same subject-matter, they may be considered as constituting parts of the same transaction. But in this case there is no reference in either instrument to the other; and they are between different parties. We think, however, though we do not expressly so decide, that the coincidences stated show that the deed and bond should be taken and construed together as parts of the same transaction.

But if we consider the deed and bond as constituting together

but one instrument, it is difficult to see how they can be construed to be a mortgage. The deed purports to be absolute upon its face. The bond is also clear and explicit. Nothing is said in either about a loan of money, or a pre-existing debt, or the payment of interest. It is true that the difference between the sum mentioned in the deed, and that stated in the bond, was \$1,050; and that this sum amounts to just ten per centum per annum upon the \$21,000—for the period elapsing between the date of the deed and the day when the \$22,050 were to have been paid. But this coincidence is slight, and is overcome by the express covenant of the bond, that Adams was to charge no *rent* during that period. The increased sum was in lieu of rent.

The deed and bond were between *different parties*; and we know of no case where it has ever been held that such a transaction could be a mortgage. On the contrary, it was held in the case of *Treat v. Strickland*, (23 Maine Rep., 234,) that if land be conveyed, and at the same time a bond be given by the grantee to the grantor, and another to convey to them the same premises upon certain conditions, the instruments do not constitute a mortgage. A defeasance is "an instrument which defeats the force or operation of some other deed or estate. That which in the same deed is called a condition, in another deed is a defeasance." (Bouvier.) Had the clear intention of the parties, as expressed in the deed and bond, been fully carried out, the deed to Adams would not have been thereby defeated, and the property re-vested in Haskell, the maker of the deed; but the title would have passed from Adams to Haskell and Woods. The bond could not constitute a defeasance to the deed, for the reason that they must be between the same parties. (14 Pick., 479, and authorities there cited. 2 Blackstone, 327, 342.)

The bond of Adams, which is set out in full in the complaint, clearly treats Adams as the owner of the premises. He stipulated under a penalty of \$44,000, that he would, "upon tender" to him of a sum, at a place, and on or before a time *specified*, convey to Woods and Haskell the premises described, without any charge of *rent*. The legal effect of the instrument is, that if the money was not *tendered* at the time and place mentioned, then Adams was not bound to convey, and would, therefore, have had the right to charge a reasonable rent. No rent was to be charged by Adams; *provided* the money was tendered at the place and time mentioned.

In the case of *Conway's Executor v. Alexander*, 7 Cranch, 237, it was said by Chief Justice Marshall: "In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance."

It will be seen, that the Court there lay down the rule, that

"the want of a covenant to repay the money" is not conclusive of the intention of the parties. This position was laid down under the practice which permitted *parol* testimony to prove that a deed absolute upon its face, was intended as a mortgage. But while the *form* of the deed was not held as conclusive evidence of the intention of the parties, the Chief Justice said: "It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not effect the case. But it must exist in order to justify a construction which overrules the express words of the instrument."

In the case of *Goodman v. Grierson*, 2 Ball & Beatty's Rep., 279, it was said, by Lord Manners: "The fair criterion by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this: are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?"

• In the case of *Flagg v. Mann*, (14 Pick., 478,) it was held, that when there was no collateral undertaking to pay the money, that "this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage or a sale, with a contract for a re-purchase upon strict terms."

It must be conceded that Lord Manners did not intend to lay it down as an inflexible rule, that mutuality must exist to constitute a mortgage; but only that it was a fair criterion by which to ascertain the intention of the parties. (1 Sand., 73.) And there would seem to be no doubt of the competency of parties to create a mortgage without this mutuality. For example, A might mortgage certain premises to B, to secure the payment of a specified sum, with the distinct understanding that B should look *alone* to the property for his security; but in case the mortgaged premises should sell for more than the debt, then the surplus to be the property of A. But in such a case, the intention of the parties should be expressed in clear and apt words, before a Court would give the instrument such a construction.

Neither in the deed of Haskell to Adams, nor in the bond of Adams to Woods and Haskell, is there a word to show any obligation on the part of Woods and Haskell to pay the sum specified in the deed or in the bond. We can find nothing making it their duty to pay the money. It is only stipulated, that if they did so *tender* it at the time and place mentioned, then Adams would do the two things stipulated by him to be done. There being no mutuality between the parties, and no apt and express words in the instruments, either taken together or singly, to show that the transaction amounted to a mortgage, and no *parol* testimony being admissible to prove it such, one must conclude

that it was not a mortgage. And for the same reasons we are led to the conclusion that it was not an ordinary sale of land, where one party stipulates to pay the purchase-money and the other to convey the premises when the payment is made; but it was a sale in the nature of a conditional sale; and when the money was not tendered as specified, the premises remained the property of Adams, discharged from the covenants in the bond. (4 Kent, 148; 4 Denio, 493; 14 Pick., 467; 19 Wend., 518; 2 Ed. Ch. R., 138; 8 Paige, 243.) As such, it was liable for his debts and subject to the attachments issued in the cases stated.

It is urged by the learned counsel of plaintiffs, that, though the bond of defeasance be laid out of the question, still the demurrer should have been overruled, as plaintiffs might have been able, under their general allegation that the transaction was intended as a mortgage, to prove it such by other testimony. But this ground is not well taken. They had first shown the title in Adams by deed absolute, and they only alleged the bond as a defeasance. Their general allegation was limited and controlled by the particular allegation that followed. When a pleader assumes to set out the particulars of his case, he must be held to have done so.

We come now to consider the question as to whether the liens of the attachments were lost in consequence of the form in which the judgments were taken. The counsel of plaintiffs insist that the liens were lost "by the fact that simple money-judgments were entered up, without any directions for the sale of the attached property." The learned counsel go on to say: "Suppose a party should, on a suit to foreclose a mortgage, take judgment simply for the amount due; he could not, under *such a judgment*, proceed to sell the mortgaged premises so as to transfer the title from the date of the mortgage."

In a foreclosure suit, one of the objects of the bill is to enforce a prior lien created by contract; and the decree of sale is a part of the relief prayed for in the complaint itself. The sale of the mortgaged premises, as such, only follows the express decree of the Court foreclosing the equity of redemption. (Code, § 246.) There are no directions given to the sheriff as to sales made under decrees of foreclosure, for the reason, that such sales are made under the directions of the Court, and not under execution.

But the case is different where property is attached as security for the judgment that may be thereafter recovered. There is no prayer in the complaint that the Court should order a sale of the attached property. The lien of the attachment arises after the commencement of the suit. The Code contains express directions to the sheriff as to property attached. (§§ 130, 132, 133.) He is directed to sell the property, if it be perishable, and to retain the proceeds to answer the judgment. There is nothing in

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the Code that requires any order of Court to authorize a sale. For these reasons, we think the objection not well taken.

The third and last point necessary to be examined is the question, whether the attachment issued in the case of *Henry v. Adams & Co.*, as alleged in the complaint, was a nullity. The twenty-second section of the Practice Act provides that a suit shall be commenced by the filing of a complaint and the issuance of a summons; and the one hundred and twentieth section allows the plaintiff, "at the time of issuing the summons, or at any time afterwards," to have the property of the defendants attached. These provisions must be strictly followed; and the attachment, if issued before the summons, is a nullity. (*Ex Parte Cohen*, 6 Cal. R., 318.) The issuance of the summons afterwards can not cure that which was void from the beginning. If we regard the attachment as void, there was no lien held by Henry upon the property at the date of the deeds to plaintiffs. The demurrer was to the whole complaint, and should have been sustained as to part, and overruled as to the residue.

It is but just to remark that the bill was framed before the decision in the case of *Lee v. Evans*, and that consequently many of the authorities referred to by counsel have no application to the case.

The judgment of the Court below is reversed, and the cause remanded, with liberty to the plaintiffs to amend.

TERRY, C. J.—I concur in the judgment on the third point mentioned in the opinion of my associate; upon the other points I express no opinion.

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PROVOST v. PIPER *et al.*

Instruments are sometimes admissible for one purpose and inadmissible for another; and, when objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they can not be regarded.

APPEAL from the District Court of the Fifth Judicial District, County of Tuolumne.

*L. Quint* for Appellant.

*O. Greenwood* for Respondent.

FIELD, J., delivered the opinion of the Court—BURNETT, J., concurring.

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Gardner v. Perkins.

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The record in this case does not contain sufficient evidence to give point to the objections of the appellant. It does not appear for what purpose the map, deed, and possessory claim, were admitted, or their bearing upon the issue. The map may have been introduced as a diagram, showing the location of the land ; in which case it was immaterial whether drawn by the county surveyor or any other person. The deed may have been offered to determine the time the plaintiff's possession commenced, and not for the purpose of deraining title from the grantors ; and, in that view, the defect in the acknowledgment was of no consequence. Its execution may have been proved by other evidence. The possessory claim may have been produced for a similar object ; and, in that regard, its want of conformity to the statute could not impair its value as evidence.

Instruments are sometimes admissible for one purpose and inadmissible for another ; and, when objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken ; otherwise, they cannot be regarded.

Judgment affirmed.

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### GARDNER *et al.* v. PERKINS.

Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

*James A. McDougall* for Appellants.

*R. T. Sprague* for Respondent.

FIELD, J., delivered the opinion of the Court—BURNETT, J., concurring.

Where the motion is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. (*Hoffman v. Livingston*, 1 Johns. C., 211 ; *Livingston v. Livingston*, 4 Paige, 111.) There are exceptions to the rule, but they depend upon the special circumstances of the particular cases. (*Dean v. Coddington*, 2 Johns. C.,

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202.) There is nothing disclosed in the record which should take the present case from its operation.

Judgment affirmed.

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### SUMMERS v. DICKINSON *et al.*

Immediately upon the passage of the act of Congress of September 28, 1850, this State became the owner, with absolute power of disposition, of all the swamp lands within her limits which had not been disposed of.

The title of the State in no way depends upon a patent. The act itself operated as a conveyance.

The Governor in issuing a patent to an individual, of such lands, acts as the agent of the State, under powers conferred by statute, and his authority extends only to such lands as were granted to the State by the act of Congress.

A patent from the Governor, purporting to convey the lands of the State, can have no validity unless expressly authorized by law.

Such a patent is *prima facie* evidence of title in the grantee, as the law presumes in favor of the acts of all public officers.

APPEAL from the District Court of the Thirteenth Judicial District, County of Stanislaus.

This was an action of ejectment for certain land in Stanislaus county. On the trial below, plaintiff offered in evidence a patent from the Governor of California, issued under the act of April, 1855, providing for the sale of swamp and overflowed lands. This evidence was rejected on the ground that no patent was shown to have issued from the United States, conveying such land to the State of California, and a judgment of nonsuit entered, from which plaintiff appealed.

#### *L. Quint* for Appellants.

The Court erred in refusing to admit the patent as evidence of title, for the following reasons:

The act provides that the swamp and overflowed lands belonging to this State should be sold at one dollar per acre, and in the manner prescribed by the act. (See Statutes of 1855, p. 189, § 1.) Every provision of said act has been strictly complied with by the appellant.

This State is supreme within its own sphere, as an independent sovereignty, and has the right to determine what shall constitute evidence of title as between her own citizens, to all the lands within her boundary. *People v. Coleman et al.*, 4 Cal. R., 46; *Nims v. Johnson et al.*, 7 Cal. R., 110. This latter decision is conclusive of this case. *Thatcher v. Peck*, 6 Cranch, 87, 127.

A patent to land shall be presumed to have issued regularly, and, if it be not void on its face, can not be avoided collaterally in

a suit between individuals, unless it issue against the positive prohibition of a statute. *Jackson v. Marsh*, 6 Cow. R., 281; *People v. Livingston*, 8 Barb. R., 253; *People v. Muran et al.*, 5 Denio R., 389; *Jackson v. Lawton*, 10 Johns. R., 23; *Browne v. Calloway*, 1 Peters R., 291; 6 ib., 727.

The legal presumption is that the Surveyor, Register, Governor, and Secretary of State, have done their duty in regard to the several acts necessary to be done by them in granting lands. 1 Cow. & Hill's Notes to Philips' Ev., 459; *Wallace v. Maxwell*, 1 J. J. Marsh. Ky. R., 447, 450; 2 Cow. & Hill's Notes, 270.

Officers authorized to ascertain and certify certain facts, those facts when found and certified to are conclusive. 2 Cow. & Hill's Notes, 247, 270.

No brief on file for Respondent.

TERRY, C. J., delivered the opinion of the Court—FIELD, J., and BURNETT, J., concurring.

The points taken by appellant in his argument, are:

1. The State, by virtue of her sovereignty, is the owner of all the public domain within her jurisdiction, and that her title to the land in question passed to plaintiff by virtue of the patent.

2. The patent is conclusive evidence of everything it purports to contain.

The question as to the ownership of the public domain within the State is not pertinent to any issue raised by the record.

By the act of Congress "to enable Arkansas and other States to reclaim the overflowed lands within their limits," passed September 28, 1850, all the swamp lands within her limits which had not before been disposed of, were granted to the State of California.

Provision was made in the act for the survey of those lands, and for the issuance of a patent to the State whenever their extent and boundaries were ascertained. But the title of the State in no way depends on the patent. The act itself operated as a conveyance.

The language of the act is explicit: "the whole of those swamp and overflowed lands, etc., are hereby granted to said State;" and, immediately upon its passage, the State became the owner of the land, with absolute power of disposition.

The Legislature, by the act of April, 1855, provided for a sale of these lands, and authorized the Governor to issue patents in favor of persons purchasing under the act. In issuing patents, the Governor acted as the agent of the State, under the powers conferred by the statute; his authority extended only to such lands as were granted to the State by the act of September, 1850; and a patent issued by him, for any land not embraced in this grant, would be void, for want of power to convey.

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Sweetland v. Hill.

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The ancient doctrine, as to the effect of a patent from the Sovereign does not apply to the patent under consideration.

The theory of the common law is, that the King, by virtue of his sovereignty, is the owner of all the lands within the realm; therefore, a grant directly from the King is conclusive evidence of title.

The sovereignty of the State of California is represented by the law-making power; the property of the State can be disposed of only by act of the Legislature; and a patent from the Governor, purporting to convey the lands of the State, can have no validity unless expressly authorized by law.

The patent offered by the plaintiff, purported to convey the land in controversy as a portion of the domain granted to the State by the act of September, 1850; and as the law presumes in favor of the acts of all public officers, it should have been admitted as *prima facie* evidence of title in the plaintiff, which the defendant might disprove, by showing that the land in question was not included in the act of Congress, or is within the exceptions contained in the eighteenth section of the act of the Legislature of 1855.

Judgment reversed, and cause remanded.

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### SWEETLAND v. HILL *et al.*

The removal of an enclosure of land, for the purpose of replacing it with a better one, so far from being evidence of an intention to abandon the premises, is direct evidence of the contrary.

An entry with full notice of plaintiff's rights, during a temporary removal of his enclosure, can not be defended on the ground that the lands were unenclosed.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

*Henry Meredith* for Appellant.

*Francis J. Dunn* for Respondents.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This was an action of ejectment for lands in Nevada county. The jury returned a verdict for the plaintiff, and a new trial being refused, an appeal is taken.

Upon an examination of the record, we are unable to perceive any error affecting the right of defendants. The testimony as to the acceptance, by one of the defendants, of a deed from the

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Hartman v. Burlingame.

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plaintiff to a different piece of land, was irrelevant, but can not have affected the verdict, which must have been the same if no such testimony had been introduced.

The point that the verdict is against the evidence, is not supported by the record. The evidence contained in the statement not only fully sustains the verdict, but is such as renders it morally certain that a different verdict could not be returned by an impartial and intelligent jury.

It appears plaintiff claimed the possessory right to one hundred and sixty acres of land in Nevada county, a portion of which he had actually enclosed, and occupied continuously from 1853.

A short time before defendant's entry, plaintiff caused the fence around the land to be removed, for the purpose of constructing a better fence of different materials. That before that time plaintiff had instituted a suit against one Froe, to recover a portion of the tract outside the enclosure; that he failed in the action, the judgment of the Court confining his possession to the actual enclosure; defendants being informed of this decision at the time plaintiff was removing the old enclosure, and before the construction of the new had been commenced, at once entered upon the land, and have continued in possession ever since.

This entry was with the full notice of plaintiff's rights. There is, in the evidence, no pretext for the supposition that plaintiff intended to abandon his possession; on the contrary, such intention is clearly disproved.

Judgment affirmed.

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## HARTMAN v. BURLINGAME AND LATHAM.

Where a party signs a joint and several promissory note, he is not entitled to notice of demand and non-payment, though in fact he signed as surety, and such fact was known to the payee.

The failure of the holder of a note to sue when requested by a surety, does not operate to discharge the liability of the latter.

If the surety desires to protect himself, he must pay the debt and proceed against the principal, or apply to a Court of Equity to compel the holder to proceed against the principal.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This action was brought upon the following promissory note :

"\$500.

MARYSVILLE, February 25, 1856.

"On or before the twenty-fifth day of May, A. D. 1856, we promise to pay to Isaac Hartman, or order, for value received,

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five hundred dollars, with interest at the rate of three per cent. per month until paid.

[Signed]

"J. BURLINGAME.

"W. B. LATHAM, JR."

Service was had only on Latham. Latham, in his separate answer, denies the indebtedness, and avers that he signed the note as surety for Burlingame, that he received no consideration whatever for which the note was given, and that the plaintiff, at the time of the execution and delivery of the note, knew the same; that plaintiff has wholly failed to demand payment of Burlingame at the time when said note fell due, and that plaintiff has also failed to give this defendant notice of the non-payment of the note.

The answer further charges that defendant Latham, after the note fell due, requested plaintiff to bring suit on said note by attachment against defendant Burlingame; that plaintiff neglected to do so; that Burlingame had property, liable to attachment at the time, sufficient to discharge the note, and that he (Burlingame) was in failing circumstances, and plaintiff was fully informed, and that Burlingame did fail shortly after, and became insolvent.

The Court below finds that Latham, though he appears on the note as principal in fact, signed as surety, and that this fact was known to plaintiff. That on the thirteenth of December, some time after the maturity of the note, Latham, fearing that Burlingame was about to become insolvent, called on plaintiff, and requested him to sue on the note, offering to point out property sufficient to satisfy it; but that plaintiff delayed bringing suit till the twenty-sixth of December; that between the thirteenth and twenty-sixth of December, Burlingame conveyed property to certain parties for a consideration of \$2000, greatly more than the amount of the note; and, from these circumstances, the Court finds that Burlingame was solvent on the thirteenth, and was insolvent on the twenty-sixth, when the suit of plaintiff was instituted.

Plaintiff had judgment, and the defendant, Latham, appealed to this Court.

*Bryan & Filkins* for Appellant.

We are surety, and they fail to show that they made demand, at the maturity of the note, upon the principal, and gave us notice of dishonor.

1. This we claim must be done under *Bryan v. Berry et al.*, 6 Cal., 394.

Our Supreme Court have lately held, in the above case, that when it appears that a party is a surety upon a note, that his is a "secondary liability wherever his name may be placed upon

the note, and that he is to be treated as an endorser, and entitled to demand on principal, and notice of dishonor, in order to be held."

But if the Court is doubtful or unwilling to receive this as law, we then proceed :

2. "That a demand by a surety upon the holder of the note to sue his principal, in order to save the surety, when refused or neglected to be performed, is an absolute discharge of the surety, when followed by the insolvency of the principal." *Pain v. Packard*, 13 Johnson, 174; *King v. Baldwin*, 17 Johnson, 388-389; *Manchester Iron Manufacturing Company v. Sweeting*, 10 Wend., 163; *Herrick v. Borst & Warwick*, 4 Hill, 650; *Strader v. Houghton*, 9 Porter, Ala.; *Bolton v. Lundy*, 6 Missouri; *Town v. Ridell*, 2 Alabama, 694.

3. The Court will perceive that the rule is broadly and elaborately laid down in the case above, in 17 Johnson, and in the case in 4 Hill, that when the surety makes the demand to sue, and the principal in the note is not insolvent at the time, but becomes so afterwards, and the surety is endangered thereby, then that the surety is absolutely discharged from all liability, if the owner and holder of the note has failed to sue in time.

He has failed to use proper diligence, and the law says that when "one of the two innocent parties must suffer, let it be him who, by his neglect, is most at fault."

There has, I admit, been much conflict upon this doctrine, in many of the old States.

There are old cases in Massachusetts, and some other States, holding a contrary doctrine.

But the modern rule is, to hold the payee of the note to the exercise of proper diligence, and if he allows the property, as well as the person of the principal (as in this case) to escape, he can not, in equity and good conscience, be allowed to hold the surety for the debt, in the face of the surety's own protest, and express demand to sue.

Our Supreme Court adopt this modern reasoning, in *Bryan v. Berry et al.*, (above,) not being hampered by the old rules of the common law, and hold him no further liable than a common endorser, and he is discharged if no demand is made when the note becomes due, and no notice of non-payment is given the surety.

We, then, claim that Latham is released from liability, and that the only remedy of the plaintiff is against the principal in the note.

1. Because he is a surety, and the note had long since been due, and there was no proof of demand, and notice of non-payment.

2. Because he can not be held under the proof he has made of his express demand upon plaintiff to sue, and the failure of the

plaintiff to sue accordingly, and insolvency of the principal following.

*E. D. Wheeler* for Respondent.

If the note had shown upon its face, that Latham signed as a surety, then, under the decisions of this Court, he would have been entitled to notice of demand and protest: but, inasmuch as there is no qualification whatever as to the capacity in which he signed, apparent on the face of the note, I can not, for a moment, believe that this Court will adjudge that notice was necessary to fix his liability. Because, when Latham signed the note, unqualifiedly, he virtually said to the plaintiff, "Treat me as a principal; I do not require, nor shall I expect, notice of demand and protest; I have signed as a principal, putting myself upon an even footing with Burlingame. The law says, if I qualify my signature by adding the word 'surety' to it, then you must give me notice; but I do not thus qualify it, and therefore waive my right to notice of demand and non-payment." It is readily perceived, that if Latham is now permitted to insist upon notice, it is rendering the decisions of Courts auxiliary to the worst kind of frauds, because Latham voluntarily executed and delivered the note, divested of any mark, badge, or sign, tending to show that he intended to occupy a secondary position on the obligation. It is reasonable, then, that Latham should abide by the consequences of his own act, for he had both the power and opportunity to define his capacity on the face of the note; but, instead of stating on the face of the note that he designed to occupy a secondary position, he plainly says his position is primary; and, of course, will mislead the holder if he is afterward permitted to show by parol that he intended just the reverse of what his written contract declares. The extent to which this Court has hitherto gone is, that where a party, on the face of the note, has added "surety" or "security" to his signature, he is entitled to notice; but in no instance is it held, that when these qualifying words do not appear on the instrument itself, that the party is entitled to notice. If such were the law, then the distinction between parol and written agreements would be at an end; and the embodying of the terms of a contract in a solemn written agreement becomes an idle formality. Without doubt, this is the general rule of law upon the subject:

"That written agreements, whether specialties or simple contracts, and whether within or without the Statute of Frauds, are not to be contradicted, varied, or materially affected by oral testimony." *Erwin v. Sanders*, 1 Cow., 250; *Payne v. Ladue*, 1 Hill, 116; *Hunt v. Adams*, 7 Mass., 518, et seq.; *Stackpole v. Arnold*, 11 Mass., 27, et seq.; *Thompson v. Ketcham*, 8 John., 190; *Fitzhugh v. Runyon*, ib., 375; *Wells v. Baldwin*, 18 John., 45.

All of the cases above cited, except the last one, are cases on

promissory notes, where the makers, as in this case, have, in one way or another, sought to evade the payment of their obligations by the introduction of parol proof, to show that the original written contract was different from what its face declared it to be; and, in every instance, the Court most emphatically refuse to hear such evidence, but strictly adhered to the rule as quoted above. It is true the rule has some exceptions, but this case does not come within the exception. The exceptions are said to be fraud, want or failure of consideration, enlargement of time for the performance, waiver of performance, mistake, or ambiguity. None of these exist in this case. The suit is on a plain, simple, and complete note, by the terms of which both of the appellants unconditionally promise to pay the respondent a certain sum of money. And now to permit this written agreement, thus plain and simple upon its face, to be contradicted by parol, and the whole legal effect thereof absolutely canceled, is certainly at variance with the settled rules of evidence, and the decisions of this Court. *Sayre v. Nichols*, 7 Cal. Rep., 535. In one of the cases cited in the opinion, (11 Mass., 53,) an agent was held responsible on a bill of exchange, because he did not define his capacity on the face of the bill, notwithstanding it was shown by parol that the payees of the bill knew at the time that the drawer was, in fact, acting in the capacity of an agent. The result of the cases is thus summed up by Mr. Justice Burnett, in the case above cited:

"The true result of these cases would then seem to be this: that the capacity in which the party acted in signing his name to an instrument, must appear alone upon the face of the instrument itself, and, if not so apparent, he must be presumed to have acted in his own individual capacity, and be held responsible accordingly."

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

Defendant insists:

1. That Latham was, in fact, liable as surety only, and was entitled to notice of demand and non-payment.

2. That the failure of plaintiff to sue when requested by surety, operated to discharge his liability.

The first point is settled by the case of *Humphreys v. Yale*, (5 Cal., 173.) The second we do not think sustained by authority.

The doctrine of the English Courts is, that a security can not be discharged by the mere neglect of the holder to sue; if he desires to protect himself, he must pay the debt, and proceed against the principal; or, he may apply to a Court of Equity, to compel the holder to proceed against the principal.

A different rule was asserted in New York, in *Payne v. Pack-*

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Douglass v. Kraft.

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ard, (13 John.,) and King v. Baldwin, (17 John.,) where it was held that the neglect of the holder of a note to sue when requested, discharged the surety; but this doctrine was expressly overruled in Barst v. Henrick, (4 Hill;) and repudiated as authority by this Court in Humphreys v. Yale.

In Barst v. Henrick, the Court held that a neglect to sue after request, would discharge the surety, provided the principal was solvent at the time of the request, and became insolvent afterwards, and before the institution of the suit.

We are inclined to doubt the correctness of the rule here laid down, but if we admit the authority of the case, we do not think the facts disclosed by the record bring this case within the rule.

The finding of insolvency of the principal, at the time of instituting the suit, is inconsistent with the other findings of the Court, and the premises in which the finding is based, do not sustain the conclusion.

The party was solvent on the thirteenth. It does not appear that he afterwards met with any loss. No debt is incurred, no attachment or execution is levied on his property. The fact on which the finding is based, is that Burlingame, after the thirteenth, sold property for a consideration of \$2,000. How the sale of property for a valuable consideration, should, in so short a period, cause the insolvency of the party, the record does not disclose, and we are unable to discover.

Judgment affirmed, with ten per cent. damages and costs.

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DOUGLASS v. H. KRAFT.

The rule is that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards.

An objection to the form of a verdict should be made on motion for a new trial. It is too late to raise it in this Court for the first time.

APPEAL from the District Court of the Fifth Judicial District, County of Calaveras.

A statement of the facts appears in the opinion of the Court.

*Robinson & Beatty* for Appellant.

*C. C. Mount* for Respondent.

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Douglass v. Kraft.

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TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

Plaintiff deposited with defendant, as collateral security for his note of five hundred and eighty dollars, certain auditor's warrants on the treasurer of Calaveras county, amounting in the aggregate to \$1350, at the time of the deposit; defendant executed a receipt for the warrants, which he signed R. Kraft.

Some time after the maturity of the note, plaintiff offered to pay the amount, principal and interest, and demanded the delivery of the warrants, which defendant declined, saying that he had sold the warrants, and parted with the note. This action was then instituted for the purpose of compelling defendant to return the warrants or pay their value.

The answer admits the deposit of the warrants and the execution of the receipt set out in the complaint, but alleges that the defendant acted in the transaction as the agent of his wife, who was a sole trader, and that the receipt was signed with the initial of his wife; it also alleges a demand of payment at the maturity of the note; and, on default, a sale of the warrants at their market value at the time, and an application of the proceeds to the payment of the note.

On the trial below, the jury found a verdict for plaintiff, and a new trial being refused, defendant appealed.

Upon an examination of the record, we are not able to discover any error in the rulings of the Court, which could have operated to the prejudice of defendant.

The instruction that plaintiff was entitled to recover the highest market value of the warrants, at any time while in defendant's possession, was erroneous. The defendant was, before the conversion of the warrants, legally in possession of them with plaintiff's consent, and could not be charged with their value during that time. However, as there was no evidence as to the value of the warrants before the conversion, the instruction did not prejudice defendant.

The rule is, when the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of the conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion, or at any time afterwards. Abbott, C. J., in *Mercer v. Jones*, 3 Camp., 476, says: "The amount of damages is for the jury, who may give the value at the time of the conversion, or any subsequent time in their discretion, because the plaintiff might have had a good opportunity of selling the goods, if they had not been detained. My opinion is, that the jury are not at all limited in giving their verdict, by what was the price of the article on the day of the conversion."

In *Cortelyou v. Lansing*, 2 Caine's Cases in Error, Kent, J., said: "The value of a chattel, at the time of the conversion, is not

in all cases the rule of damages in trover. If the thing be of a determinate and fixed value, it may be the rule; but where there is an uncertainty or fluctuation attending the value of the chattel, and it afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at the time he calls upon the defendant to restore it, and one of the cases even carries down the value to the time of the trial."

The jury found for plaintiff the value of the warrants at the time when their return was demanded.

Appellant contends that, inasmuch as the receipt for the warrants was given in the name of R. Kraft, the action can not be maintained against H. Kraft without an allegation of fraud or deception in signing one name for the other, or showing that one was an *alias* for the person known by the other.

The complaint sufficiently shows that R. Kraft and the defendant are one and the same person; it charges that the warrants were deposited with, and the receipt signed by, the defendant Henry Kraft, and the copy of the receipt, which is set out in the complaint, is signed R. Kraft.

The evidence shows that the defendant acted as principal in accepting the pledge, signing the receipt, and selling the warrants. There is nothing in the record (except the allegation in the answer, which is not supported by any testimony,) to show that there is any such person in existence as R. Kraft, or that defendant assumed to act as the agent of a third party.

The objection to the form of the verdict should have been made on motion for a new trial. It can not be raised here for the first time.

Judgment affirmed.

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### SEAVER v. CAY AND WIFE.

Where the record shows that a demurrer was interposed to the complaint, and was sustained by the Court, and afterwards, during the same term, a judgment was rendered in favor of the plaintiff, this Court will not presume that the order sustaining the demurrer was set aside by the Court before judgment was rendered. In such a case the record shows that judgment was improperly rendered.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

*Bryan & Filkins* for Appellants.

*Charles Lindley* for Respondent.

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Battersby v. Abbott.

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TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

The record in this cause shows a somewhat singular state of case.

A demurrer to the complaint was interposed, and was sustained by the Court, and afterwards, during the same term, a judgment was rendered in favor of the plaintiff.

Respondent contends that inasmuch as the proceedings of a Court are deemed regular and legal until the contrary is shown, we must presume that the order sustaining the demurrer was set aside by the Court before judgment was entered.

We do not feel at liberty to indulge this presumption in the face of the clerk's certificate as to the correctness of the transcript, and in view of the fact that the respondent has not thought proper to suggest a diminution of the record, in order that the omission might be supplied.

The record shows that the judgment was improperly rendered, and it is reversed, and the cause remanded for further proceedings.

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### BATTERSBY v. ABBOTT.

A statement on appeal is sufficient when the Judge certifies that it is substantially correct. It is not necessary that the testimony should be stated in the precise words of each witness.

It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. It is error for the Court to charge the jury as to a question of fact, or as to the weight of evidence.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This was an action of ejectment brought to recover the possession of a tract of land, together with damages for its detention.

The defendant claimed title by virtue of a purchase of the premises at sheriff's sale, under an execution issued upon a judgment against the plaintiff; and on the trial introduced in evidence, in support of his claim, the judgment, execution, and sheriff's deed to him for the premises in question. The plaintiff, to rebut this proof on the part of the defendant, introduced evidence to show that the premises had been redeemed prior to the execution of the deed from the sheriff to the defendant.

After the close of the testimony, the Court instructed the jury "to find for the defendant, as the plaintiff had failed to show any payment in redemption of the premises." Plaintiff excepted to this instruction. The jury returned a verdict for the defendant, and judgment was entered thereon. Plaintiff appealed.

It does not appear affirmatively from the statement on appeal, or the record, that the defendant was notified of the settlement by the Judge of the statement. The Judge's certificate to the statement is as follows:

"I hereby certify that the foregoing statement is substantially correct.

(Signed)

"W. T. BARBOUR, District Judge."

*Bryan & Filkins* for Appellant.

Whatever force might be given to the evidence of Spring, or of the other witnesses, and whether the weight of testimony was or was not with the defendant, the Court clearly overstepped its duty in its charge to the jury.

The Court there tells the jury, in direct words, to find for defendant, as the plaintiff had made out no case. This is so clearly error, that the case can stop here.

Under no decision of any Court can this be sustained. The Court is both Judge and jury, and goes further than Lord Mansfield ever dared to go in his assumption of the powers of Judge and jury in England.

Our system most certainly keeps the two departments of the Court separate. Cons. Cal., Art. 6, § 17.

The Court shall only judge the law, the jury the fact, without the interference or influence of the Court. Wood's Digest, Art. 898, p. 188.

A person could not be excused quoting authority upon a proposition so plain.

We have the case upon the proof, and supposing the law regulating the possession of lands had been sufficiently settled in this State, we refuse to argue the case, leaving it upon the instructions of the Court, and the Court has made the mistake. It tells the jury to bring in a certain verdict, and this never can be allowed. We claim a reversal and new trial.

*E. D. Wheeler* for Respondent.

1. The statement was settled by the Judge, without any notice to myself, as the attorney of respondent. The one hundred and ninety-fifth section of the Practice Act says, "it shall be settled by the Judge, upon notice." Under that section, I was entitled to notice. The first intimation that I ever had that a statement had been settled, was by finding the statement, already

settled, among the clerk's papers. I then drew up a counter-statement, differing in many important facts from the present one, but could not get a hearing on it. I suppose the refusal was based upon the doctrine of *stare decisis*. The only evidence this Court has that such notice was not given is, that the record is silent upon the subject. The record should show, affirmatively, that the notice was given. It should contain the notice itself, or a copy thereof, or an affidavit that one had been served; or, at least, the Judge's certificate of settlement should recite that it was done, upon "notice to the adverse party," or, "that both parties appeared," etc. Now this rule holds good in relation to the judgment itself, and why should it not in relation to an *ex parte* statement, on the strength of which the judgment is sought to be overturned? The record of a judgment, or a certified transcript thereof, in a foreign Court, amounts to nothing unless it also show, affirmatively, that the defendant had notice, or was present in person, or by attorney. Hence, our Practice Act, following the analogies of settled law, provides, section two hundred and three, that the clerk, in making up the judgment-roll, shall attach together the pleadings, judgment, and summons; and, where there is no answer made, then "the summons, with the affidavit or proof of service."

It seems just and consistent, then, that if a judgment must carry with it affirmative proof that the judgment-debtor had due notice, most certainly a statement, on which the judgment is sought to be reversed, should contain the same evidence, particularly when the statute requires notice.

2. The statement should be discarded, because the certificate of the Judge is insufficient and defective. It contains no evidence that the Judge settles the statement as required by statute. It simply says, "I hereby certify that the foregoing statement is substantially correct." This is the certificate. The word "substantially" may mean, in Judge Barbour's sense, one thing, and in the view of this Court it may mean quite a different thing. It is a vague and uncertain term, and should not be received as descriptive of the correctness of a statement on appeal.

A prominent feature in all law proceedings, I mean in the drawing of legal documents, is certainty. And it is frequently the case, that the wording of a single sentence, or even the change in a single word in the sentence, exercises a decisive influence on the termination of the cause pending. How, then, can this Court determine that this statement is complete and full, so far as the respondent is concerned, when the Judge does not settle the statement, but simply says it is substantially correct? If the statement simply averred or recited that "this was an ejectment-suit; that each party produced several witnesses; that the cause was argued; and that a verdict was rendered for

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the defendant," this would be substantially correct. It would recite the prominent facts of the case, but it would not develop the particulars of the trial, the different shades of the evidence, the objections and exceptions taken; nor would it show, at all, the legal points to be considered by the Appellate Court, yet it would be substantially correct.

TERRY, C. J., delivered the opinion of the Court—FIELD, J., and BURNETT, J., concurring.

The objections to the statement in this case are not well taken.

The Judge certifies that the statement is substantially correct. This is entirely sufficient. It is not necessary that the testimony should be stated in the precise words of each witness; the substance of the testimony is all that is required to be set out in the statement.

It is no objection to the statement that it does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts.

From the statement, as settled, it appears that the Judge instructed the jury "to find for the defendant, as the plaintiff had failed to prove a redemption."

This instruction was clearly erroneous. The question of redemption was the main point in issue between the parties. It was a question of fact for the jury, and as the evidence was conflicting, the instruction amounted to a charge on the weight of evidence.

Judgment reversed, and cause remanded.

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### PACKER *et al.* v. HEATON *et al.*

Where the regulations of a mining locality require that every claim shall be worked two days in every ten : *Held*, that the efforts of the owners of a claim to procure machinery for working the claim, are, by fair intendment, to be considered as work done on the claim.

So, also, is working on adjoining land in constructing a drain to enable the owners to work the claim.

In an action by a company of miners to recover possession of a mining-claim, and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

A statement of the facts appears in the opinion of the Court.

*Dunn, Smith & Galloway*, for Appellants.

*McConnell & Niles* for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover the possession of a mining-claim, and damages for the detention thereof. The defendants had judgment in the Court below, and the plaintiffs appealed.

The main question in this case has relation to what constitutes a forfeiture, or abandonment, of a claim, under the regulations of that particular locality. It appears that in October, 1854, certain rules and regulations were adopted at a meeting of the miners at that point, the fifth of which is as follows:

“All claimants or companies shall work, or cause to be worked, his or their claims at least two days in every ten, from the first day of May to the first day of November.”

It appears that the ground in dispute was located by defendants in August, 1854, and a large amount of work done during that year, in the sinking of shafts, to reach the deposits below. But from the great depth of the diggings, and the inflow of water into the shafts, it was found impossible to work the mine successfully without the aid of machinery propelled by steam. The last work upon the premises, by defendants, was done about the fourth of July, 1855. On the thirteenth of August, 1855, the plaintiffs located the claim. But between the fourth of July and the twentieth of August, when the defendants recommenced work upon the ground in dispute, they were engaged in efforts to procure the machinery necessary to prosecute their labors. At the request of the plaintiffs, the Court instructed the jury, that, though the defendants were first to locate the claim, yet, if they subsequently abandoned it, and the same was located by the plaintiffs while it was so abandoned, and the plaintiffs had complied with all the rules, regulations, and customs of the locality, up to the time of bringing the suit, then the plaintiffs were entitled to recover. The Court refused to instruct the jury, at the request of plaintiffs, that the unsuccessful efforts of defendants to procure machinery could not avail them as an excuse for not working upon the claim, as required by the rules; but, at the request of defendants' counsel, instructed them, that if the defendants were the prior possessors of the claim, and, at the time the plaintiffs located the same, were engaged in efforts to procure the necessary machinery, and did procure the same within a reasonable time, then the defendants were entitled to hold the claim against the plaintiffs.

The question as to the validity of this mining rule does not

necessarily arise in this case, and we therefore express no opinion in relation to it. The instruction given by the Court, at the request of the defendants, though not within the strict letter of the rule, is yet within its true spirit and intent. The efforts to procure the machinery, with the *bona fide* intent to work the claim, may be justly considered as work done upon the claim, by relation and intendment. It seems that the plaintiffs were placed, substantially, in the same position with respect to this point. They had done no work within the actual limits of the claim, but had worked upon adjoining ground, in constructing a drain. The Court very properly instructed the jury that this work was done upon the claim, within the true meaning of the rule. The rule did not require either party to do a vain and idle thing. The owners of claims are not required to waste their labor in doing that which can lead to no practical result. It seems that one company expended their labor in procuring machinery, while the other was engaged in constructing a drain; that the work, in both cases, was not done upon the claim, strictly speaking; but that the end intended to be accomplished was the same, and the reasonable result the same in both cases. Both parties intended to drain the claim; and the only difference was, they used different means to attain the same end.

The Court, at the request of the defendants, instructed the jury, that if the defendants were in the possession of the mining-ground in dispute, prior to the location of plaintiffs, and had not disposed of or abandoned the same, then they must find for the defendants.

The counsel for the plaintiffs insist that this instruction was erroneous, as it excluded the idea that the defendants could have forfeited their right to the claim.

It is unnecessary to inquire and decide whether the owner of a mining-claim can forfeit the same by a failure to work upon it within ten days, as required by the rule. There was no error in giving this instruction under the circumstances. The plaintiffs, in the first and second instructions asked by them, said nothing as to a forfeiture of defendants' right, but confined their instructions to the case of abandonment. It is true, that in the fifth, sixth, and seventh, they referred to the specific facts, as not constituting an excuse for the failure to work within the time limited. These latter instructions were properly refused, and the plaintiffs had not relied upon any other acts alleged to constitute a forfeiture. The result was, that the plaintiffs rested the case upon the ground of abandonment, and also upon certain facts not constituting a forfeiture. There was nothing in the facts proven tending to show a forfeiture. The giving of this instruction could do the plaintiffs no harm. The objection to the seventh instruction, given at the request of defendants, was not well taken, as the instruction was in substance the same as the

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one just noticed. The ninth and twelfth instructions offered by defendants were not given by the Court, as appears from the record. The letter of Kibbe is not contained in the record, and we can not judge whether its admission was error or not. The mere fact that the letter was admitted, does not show error.

We think the testimony of Ballinger was properly excluded. He was a member of the plaintiffs' company during a part of the time transpiring between the date of their location, on the thirteenth of August, 1855, and the commencement of this suit, June 10, 1857. His bill of sale to the other members of the company, left him interested in the damages sought to be recovered.

The Court properly overruled the motion for a new trial. The verdict was not contrary to the testimony. There was no surprise on the part of plaintiffs that fair diligence could not have avoided. The mistake of counsel, as to the competency of Ballinger, was no cause for granting the motion. The objection to his competency could have been readily removed.

Upon the whole, we think that substantial justice was done, and the judgment of the Court below must be affirmed.

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THE PEOPLE *ex rel.* HAMILTON *v.* HARRIS.

It is the duty of a justice of the peace, when an appeal-bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day.

An offer to pay the justice his costs, on appeal, so soon as the appeal-papers are ready to transmit to the County Court, is not a sufficient tender, under the statute. The fees must be tendered unconditionally.

The justice is not bound first to make out the papers, and then rely on his fees being afterwards paid.

Where an alternative *mandamus* was issued to a justice of the peace to compel him to send up papers on appeal to the County Court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ:" *Held*, his answer is no defence to the writ being made peremptory, as the fees may have been paid since the service of the writ.

APPEAL from the County Court of San Francisco County.

The facts appear in the opinion of the Court.

A. T. Willson for Appellant.

J. A. McDougall for Respondent.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

*Mandamus* from the County Court to compel the defendant, a

justice of the peace, to transmit the papers and the copy of proceedings, in the case of *Rabe v. Hamilton* and others.

It appears that the bond was filed with the justice on the 20th May, 1857, in the sum of two thousand dollars, and the proper affidavit of the two sureties was made before the justice. The bond was not marked "approved" by the justice, but was received by him without objection at the time. On the next day the justice endorsed upon the bond "not approved."

We think the justice should have rejected the bond promptly. Under the circumstances, we must hold that the bond was approved.

The next point made by the defendant is, that his costs were not tendered as required by law. The affidavit of Hamilton states that he "was and is ready to pay the justice's fees on appeal, so soon as the papers were ready to transmit to the County Court, and offered to do so within the ten days allowed by law."

The 627th section of the Code requires the justices' fees to be paid before the justice is required to send up the papers. We think this provision applies to appeals from Justices' Courts, in cases of forcible entry and detainer. The sixteenth section of the act (Wood's Digest, 469,) provides that either party "may appeal within ten days, as in other cases tried before justices of the peace;" and the seventeenth section repeals all laws requiring a statement of the case, or evidence, or exceptions to be taken before a justice, in these cases of forcible entry and detainer. It would have been entirely unnecessary to put in this repealing provision, if the provisions of the Practice Act would not otherwise apply to such cases.

The true construction of this act, as to the mode of proceeding, would seem to be this: The case must be governed by the provisions of the act, so far as they go, and as to other matters not embraced by the words of the act, the general rules governing proceedings in these Courts will apply.

An offer to pay, *when the papers are made out*, is not sufficient to constitute a tender of the fees. The appellant must tender to the justice the amount of his fees, unconditionally. If the justice refuses to state the exact amount, then the appellant should offer to deposit with him such amount as he may demand, as surety for the fees, when ascertained. If an excessive deposit be demanded, the appellant should tender the amount he may judge sufficient; but he must be careful to tender an amount equal to the fees; otherwise his tender will not be good. The justice is not bound first to make out the papers, and then rely upon his fees being afterwards paid. He is not bound to credit the appellant.

In this case, the affidavit did not show a strict compliance with the statute; but we think this was no cause of demurrer. The affidavit was sufficient to authorize the issuing of the *alternative*

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Hayden v. Davis.

writ. The right to the fees is a matter that the justice may waive. The provision was intended for his benefit. (*Bray v. Redman*, 6 Cal. Rep., 287.) This right he should assert by answer. The objection that the defendant's fees were not paid or tendered, was set up in the answer; but it is only alleged that the fees were not paid or tendered "previous to the time of the service of the alternative writ of *mandamus*." This allegation was a good excuse for not making out the papers, before the alternative writ was served, but was no justification for refusing to do so after the service; provided the fees were tendered a reasonable time before the answer. The failure of the defendant to state that they were not tendered at any time, either before or since the service of the writ, was fatal to his defence. Had he stated that the fees were not tendered before the service of the writ, but that they had since been paid or tendered, and therefore he had sent up the papers, and the facts had corresponded with the answer, then the Court should have taxed the relator with the costs of the proceeding.

The appeal itself was perfected when the bond was filed and notice given. If the appeal be not prosecuted, the same may be dismissed, after notice in the Appellate Court. (§ 367.) The provisions of § 627, in reference to the payment of fees, refer to the making out of the papers. The payment or tender of the fees does not strictly constitute a condition of appeal, but a condition precedent to sending up the papers; but this condition may be waived by the justice, or the fees may be paid at any time, so as to bring the case up before the County Court, within the period limited by the rules of that Court. The appeal is taken in ordinary cases, by complying with the provisions of §§ 624, 625, and 628.

Judgment affirmed.

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### HAYDEN v. DAVIS.

Where the defendant, a master of a vessel, received certain goods of plaintiff, to be delivered at a certain place, which he failed to do, and in the action brought thereupon he offered to prove that the goods belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of the goods by fraud: *Held*, that he was entitled to prove such facts.

To the general rule that a bailee will not be allowed to set up title in a third party, in an action brought by the bailor, there is an exception in cases where the bailor's possession was obtained by fraud.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

The facts appear in the opinion of the Court.

*Shattuck, Bristol, and Spencer, for Appellant.*

*J. B. Hart for Respondent.*

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., and FIELD, J., concurring.

The defendant, who is master of a vessel, received from plaintiff's agent, at Petaluma, certain wheat, to be transmitted to plaintiff at San Francisco.

Defendant failed to deliver the wheat on demand, and plaintiff instituted this action for its recovery.

On the trial, defendant offered to prove by the depositions of several witnesses that the wheat in question was the property of one Edwards; that plaintiff had obtained possession of it by fraud and false representations; and that Edwards, the true owner, had forbidden defendant to deliver it to plaintiff.

The Court held that defendant having received the property from plaintiff could not set up title in a third party to defeat the claim of his bailor, and rejected the evidence of ownership in Edwards.

The general rule is that in an action by the bailor the bailee will not be allowed to set up title in a third party.

There is, however, an exception to this rule in cases where the bailor's possession was obtained by fraud.

In *Hendman v. Wilcock*, (9 Bingham, 378 N.,) defendant was employed to sell certain goods then in plaintiff's possession.

These goods were claimed by the assignees of a bankrupt, and notice of the claim given to defendant before the sale. The jury found that the possession of plaintiff was obtained by means of a fraudulent collusion with the insolvent, a verdict for defendant was entered, with leave to plaintiff to move for judgment for the amount of sale, if the Court should be of opinion that the defence was not admissible. After argument before the Court of Common Pleas, it was held that the evidence was properly admitted.

The case of *King v. Richards*, (6 Wheaton, 418,) is directly in point. The defendants were common carriers, and receipted for the goods, to be delivered in Philadelphia, to the order of the assignor of plaintiff. Defendant offered to show that the goods were the property of one Lasala, and that the possession of Hul & Co. had been fraudulently acquired, and that the goods had been delivered to the owner before notice of the assignment of the bill of lading to plaintiff.

This evidence was rejected, and judgment had for plaintiff.

On appeal, the judgment was reversed. The Court said: "If the bailee receive the goods from the bailor, innocently, under the impression made by the bailor that he is the owner thereof,

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McKune v. Montgomery.

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or has the right to dispose of them in the manner he is doing, and therefore promises to return the goods to the bailor, it is very obvious that such a promise ought not to be regarded as binding, because obtained through a false impression made willfully by the bailor; and truth, which lies at the foundation of justice, as well as all moral excellence, would seem to require, in every such case, that the goods should be delivered to the true owner, especially if he demanded the same, instead of the wrongful bailor."

In the same case, (p. 427,) the Court say: "It may be correct enough to hold where the real owner of the property does not appear to assert his right to it, that the carrier or bailee should not be permitted, of his own mere motion, to set up a defence against the bailor, such right for him. But it would be repugnant to every principle of honesty to say that, after the right owner has demanded the goods of the bailee, the latter shall not be permitted, in an action brought against him by the bailor for the goods, to defend against his claim, by showing clearly and conclusively that the plaintiff acquired possession of the goods, either fraudulently, tortiously, or feloniously, without having obtained any right thereto."

The exception to the general rule as to the liability of bailees is recognized in Angell on Carriers, § 336; Story on Bailment, 450; Story on Agency, 217, and is, we think, founded in reason and justice.

A different rule would be productive of great hardship to the bailee in such cases.

"For when the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title." (Story on Bailment, 582.)

It follows that the evidence of ownership in Edwards was improperly rejected.

Judgment reversed, and cause remanded.

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McKUNE v. MONTGOMERY *et al.*

In an action of ejectment, a tenant can not deny the title of the vendor of his landlord.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

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People v. Dolan.

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*Smith & Hardy* for Appellants.

*Crocker and Robinson* for Respondent.

TERRY, C. J., delivered the opinion of the Court—BURNETT, J., concurring.

This is an action of ejectment for lands in Sacramento county.

It appears from the record that defendant Montgomery entered upon the premises in dispute, as the tenant of Caulfield, the vendor of plaintiff, and that defendant Bacon's possession was acquired from Montgomery.

Having entered under Caulfield, the defendants are not in a position to question his title to the premises. Whether Bacon's entry was before or after his co-defendant had denied his landlord's title, and claimed to hold adversely, is immaterial.

Judgment affirmed.

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### THE PEOPLE v. DOLAN.

An indictment charging "murder in the first degree," is good, as that offence includes murder in the second degree, and manslaughter.

The substantial facts necessary to constitute the crime charged, must appear in the indictment with sufficient certainty to enable the Court to pronounce a proper judgment, and the party to defend against the charge; but they need not be stated with the particularity required at common law.

It is sufficient if a man of ordinary intelligence can understand from the indictment, that, under such circumstances as showed a felonious intent, a mortal wound was inflicted by the defendant upon the deceased, of which wound he died within a year and a day from its infliction.

The absence of the word "deliberate" in such an indictment, where the crime is alleged to have been committed "with malice aforethought," is immaterial, the expressions being synonymous.

It is sufficient if the indictment charge the offence in the language of the statute defining it.

APPEAL from the District Court of the Fifteenth Judicial District, County of Butte.

The defendant was indicted, tried, and convicted of the crime of murder. The material averments in the indictment are as follows:

"The said John Dolan, on the twenty-fifth day of October, A. D. one thousand eight hundred and fifty-seven, at a place near Evansville, and some two miles therefrom, in the county of Butte aforesaid, and before the finding of this indictment, did willfully, unlawfully, feloniously, and with malice aforethought, shoot, bruise, and wound, one Edward Sharkey, upon the body of the said Edward Sharkey, with a pistol, then and there in the

hands of the said John Dolan, from which said shooting, bruising, and wounding of the said Edward Sharkey by the said John Dolan, the said Edward Sharkey did die, to wit: on the said twenty-fifth day of October, A. D. 1857, and by thus shooting, bruising, and wounding with pistol, as aforesaid, the said John Dolan did then and there, willfully, unlawfully, feloniously, and with malice aforethought, kill, and murder, the said Edward Sharkey, against the form of the statute," etc.

The defendant demurred to this indictment. The grounds of demurrer were the same as those taken on appeal, and set forth in the opinion of the Court, with the additional ground that "the indictment does not state that said deceased died in the county." After conviction, defendant moved for a new trial and in arrest of judgment. Both motions were denied, and defendant appealed to this Court.

*L. C. Granger* for Appellant.

The defendant submits, that this indictment is "direct and certain" in none of the requisites held by this Court essential, in the case of *The People v. Jacinto Aro*, 6 Cal. R., 207, where it is distinctly avowed, that "there is little or no difference between the requirements of an indictment at common law and under our statute, except in the manner of stating the necessary matter." By this decision the Court below ought to have been governed in determining the sufficiency of the indictment—and that ruling of the Supreme Court had been made nearly two years since. And the defendant brings his cause before this ultimate tribunal, and urges:

1. That the indictment wrongly attempts to fix or designate the degree of murder.

This part of an indictment is regulated by the statute, which declares that the jury before whom any person indicted for murder shall be tried, shall by their verdict designate the degree. Crimes and Pun., § 21. Defendant claims from this statute, that the grand jury can find an indictment only for murder; and the nice distinctions which are necessary to be drawn in determining the degrees of murder, are not proper for them to undertake; it is not presumed that they are furnished with all the evidence requisite for that purpose; it would not be safe for them to designate the degree; for the defendant's cause, as it is difficult to discern the difference between the degrees of murder, would be prejudiced by such a course; for all are aware of the influence of the expression of an opinion as to the degree of the offence by a tribunal so imposing, upon the minds of the trial jury.

It is humbly urged, that in this matter the grand jury assumed powers expressly and exclusively entrusted to the trial jury. The statute declares, that on an indictment for murder, the trial

jury shall designate the degree. The powers and duties of each body in reference to the crime of murder are by law fixed, beyond which it is fatal for either to go.

2. The indictment is insufficient in its statement of the acts and circumstances necessary to constitute the offence charged.

The indictment in this case, in more respects than in designating the degree of murder, it is most confidently insisted, is an anomaly in the history of criminal prosecutions in this State. It is particular where it should be general, and *vice versa*. In laying the venue, where the county is only required, it aims to give the exact spot of the occurrence—"at a place near Evansville, and some two miles therefrom, in the county of Butte, aforesaid." But where the statute requires direct and positive averments of the acts and particular circumstances that constitute the offence, it happily avoids all detail as tedious and prolix, and charges, vaguely, generally, and by implication, difficult of comprehension. For instance, it charges that defendant "did shoot, bruise, and wound, upon the body of the said Edward Sharkey, with a pistol;" and from this draws an inference, (it does not directly charge anything of the kind,) that Edward Sharkey died, as a necessary consequence thereof. This is all the act that John Dolan did, to wit: He "did shoot, bruise, and wound, upon the body of the said Edward Sharkey;" and yet it concludes by a kind of logical deduction of the genus *non sequitur*, as follows, to wit: "from which said shooting, bruising, and wounding of the said Edward Sharkey, by the said John Dolan, the said Edward Sharkey did die, to wit: on the twenty-fifth day of October, A. D. 1857; and by thus shooting, bruising, and wounding with pistol, as aforesaid, the said John Dolan did — kill and murder," etc.

The statute requires the indictment to state how John Dolan did commit the offence—the acts which he did in order to commit murder in the first degree. This is what we infer from our statute, when it requires a "statement of the acts constituting the offence;" for "murder is a conclusion of law from certain facts, and it is necessary that the facts should be stated in the indictment with convenient certainty. The People v. Aro, 6 Cal. Rep., 207. Very well, how then is it charged that John Dolan committed the offence? Why, he "did shoot, bruise, and wound, upon the body of the said Edward Sharkey, with a pistol." An uneducated man, of common sense, who never entered a Court of Law, in describing how one committed murder upon another, and the "acts" and "particular circumstances" by which it was effected, would never have given so uncertain an account of it. Such a man would have made the acts produce the death of the deceased beyond inference or absurdity; he would have described the instrument of death, loaded for the purpose, the vital parts which were penetrated by the leaden

bullet—the mortal wound which was thereby produced. Nothing would be left to uncertainty, doubt, or illogical implication. And all this does our statute require, in simple, brief, but positive language. If this indictment had charged that defendant did shoot one Edward Sharkey, to the body of said Edward Sharkey, the conclusion that this produced his death, or effected the murder, would have been just as logical and as reasonable as that the act alleged did produce it.

If the defendant had shot, bruised, and wounded the hand of Edward Sharkey, it would have been done upon his body. Would common sense infer that death necessarily resulted therefrom? Or, suppose the ball struck the bone between the knee and ankle, and flattened itself upon the bone. Would this, in one case out of a thousand, produce death? But still, it is upon the body. Is, then, the simple averment that defendant “did shoot, bruise, and wound, upon the body of Edward Sharkey with a pistol,” a sufficient “statement of the acts constituting the offence” charged? Do such acts constitute the offence of murder; or does it at all show how he “committed” the crime? Had the indictment but stated that defendant, with a pistol thereunto charged with powder, cap, and leaden bullet, did shoot and wound the deceased in the fore part of his body, penetrating through the body of deceased in the part aforesaid, inflicting there a mortal wound, of which the deceased did die, etc., the description or statement of the acts would be as brief as that adopted, and would have made out a complete case of murder, so far as the naked acts could constitute it. The defendant, therefore, submits that this Honorable Court must ignore its frequent and uniform decisions, in the case of the *People v. Aro*, 6 Cal. Rep., 207; in that of *The People v. Lloyd*, 9 Cal. Rep.; in that of the *People v. Wallace*, 9 Cal. Rep.; and in that of *The People v. Cox*, 9 Cal. Rep., before it can admit the sufficiency of this indictment in its statement of the acts and circumstances constituting the offence charged. Under those decisions, with the utmost confidence, we claim, “that the substance of the indictment must still be the same as at common law.” Because, in the absence of any statutory provision to the contrary, the common law of England is, in this State, established as the rule of decision; and by express enactment is made so in all cases where it is not “repugnant to the laws” of our statute.

3. The indictment does not contain a sufficient charge to predicate thereon a verdict of murder of the first degree.

As at common law, there are no degrees of murder, but all murder is treated and punished alike; the wretch who carries off his victim by the secret agency of poison; and he whose passions have been inflamed by foul aspersions of his character, smarting under the indignity for days, has at last concluded to let the outrage pass unavenged, but upon an unexpected meet-

ing, the presence of his enemy rouses with overwhelming energy the sense of his wrong, and without any renewed provocation, he strikes down and slays his enemy; both are treated alike at common law. But our statute having declared that there are degrees in the crime of murder, having drawn the distinctions between them, and having set forth the essential ingredients of each degree, the defendant insists that the technical terms commonly used in describing the crime of murder at common law, are not sufficient under our statute to make up the offence of murder of the first degree. It is evident that the statute of California in relation to this crime, is different from that of any other State; and the distinctions drawn by it between the two degrees, are far from being what has been generally considered. While it is to be regretted that the clear and just distinctions, which have obtained in some of the other States, have not been adopted by our statute; still, we have to take the law as it is, and not attempt to define the degrees differently from what our Legislature has established.

The difference, according to our statute, between the two degrees of murder, cannot possibly be mistaken; and it is regulated wholly by the quality of the malice attaching to each degree. The malice which belongs to the first degree is express; that which belongs to the second degree is implied. Express malice is defined by statute to be a "deliberate intention" to kill; and it is "manifested by external circumstances capable of proof." By the twenty-first section, all kinds of "deliberate" killing, with "malice aforethought," are classified with the first degree of murder. Deliberation, therefore, as well as premeditation, enters into "express" malice, and necessarily excludes "express" malice from the second degree, confining it entirely to the first degree. Express malice can always be proven where it exists, for it is manifested by external circumstances capable of proof." It is always clearly exhibited by the means adopted to effect the killing; or it may be proven by previous threats and menaces. The malice which belongs to the second degree, is known only by implication; it is "when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." The mere fact of the unlawful killing being proved, therefore, the law presumes "implied malice," and at once fixes the grade of the murder at the second degree. It is "aforethought," although, perhaps, but momentary; because it is presumed the party killing intended to do what he did. But it must be always proven that the act was deliberated upon in cool blood; that the intention to kill had become the settled purpose and fixed determination of the party killing, previous to the commission of the act—before the grade of the crime can be raised to the first and highest magnitude; for malice may be premeditated without being deliberate, for the reason that kill-

ing may be done upon a slight and inconsiderable provocation soon after it occurs, and before the mind did coolly ponder, reason, and deliberate upon it; and the killing was premeditated, because the party killing did what he intended to do. In this supposed case, the act itself shows not deliberation, but that general malice which riots in an "abandoned and malignant heart."

Passion is blind—"it is hasty, rash, following the first impulse of the moment; malice is cool, circumspect, slow, brooding, meditating, planning." "Malice does not mean mere passion; for the very existence of passion is often evidence that there was no malice." *Beauchamp v. The State*, 6 Blackford's R., 311. And it is claimed that the distinctions which are recognized in these laws of mind, have been incorporated in our statute, because they do exist, and influence human actions.

When the statute declares that there are two degrees of murder; that "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree,"—it means that the unlawful killing, with "malice aforethought," unless it was further done by poison, lying in wait, torture, or other kind of deliberate killing, or in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, is murder only of the second degree. Killing, by means of poison, lying in wait, or torture, presumes deliberate "malice aforethought." Killing, in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, is expressly declared to be murder of the first degree, whether it was done with or without deliberation and premeditation. Therefore, it is by us insisted that before any citizen can be convicted of murder of the first degree, it must be proven that the killing done by him was deliberate, as well as premeditated, or in the perpetration or attempt to perpetrate either arson, rape, robbery, or burglary. If it must be proven, it must be charged in the indictment. See 1 Chitty Crim. Law, 172. It is not enough to charge the killing to be willful, unlawful, felonious, and of malice aforethought,—for all this simply makes out a case of murder of the second degree.

But we are told that the trial jury, after hearing the evidence, must designate the degree of murder. And can the jury designate a grade of offence higher than that which is laid in the indictment? Again, it is said that the technical terms employed in this indictment are sufficient, at common law, to support a conviction for murder. Well, there were no degrees of murder at common law, with each degree distinctly marked, and differing the one from the other. Besides, the meaning of terms is

changed frequently in the lapse of years; and there can be no better evidence that the term "aforethought" does not now, necessarily, imply deliberation, than the words employed by our statute in defining the first degree of murder. It is a rule of law, well established, that in charging the commission of a crime, the exact words of the statute descriptive of the offence must be adopted in the indictment. 1 Chitty Crim. Law, 283, and Notes, where the principle is carried to the fullest extent. "Indictments framed upon statutes must conform strictly to the words of the enactment." *State v. Brown*, 4 Porter, 410; *Hamilton v. Commonwealth*, 3 Penn., 142; *State v. Casados*, 1 Nott & M., 91; *Updegraff v. Commonwealth*, 6 Serg. and R., 5; *State v. Raines*, 3 McCord, 533; *State v. Petty*; *Harper*, 59; *U. States v. Lancaster*, 2 McClean, 431. "No rule is better settled than that which requires, as sufficient in an indictment, the averment of an offence in the language of the statute creating it." *State v. Bougbee*, 3 Blackford, 308, etc. "Where a statute employs a general term, and afterwards more special terms, in defining the offence, an indictment using the general term only, is bad, though it would, in its meaning, comprehend the special term. *State v. Plunket*, 1 Stewart, (Ala.) 11; *Rex v. Cooke*, Leach C. C. L., 123. It is a rule of common sense, also, that the less does not contain the greater offence, in that class of crimes having reference to injuries done to the person. The defendant asked the District Court to instruct the jury that they could not find him guilty of murder of the first degree under the indictment, which was refused. He brought the error forward in his motion in arrest of judgment, and was still refused. And now, having seen no reason to change his views, he comes to this Honorable Court, and declares that he has been found guilty of a higher degree of crime than was charged against him by a grand jury of his county; that they mistook the degree of his offence, calling that first which was but second, and imposing their mistake upon the Court and jury by whom defendant was tried.

Again: the second degree of murder being declared by statute to be an unlawful killing, "with malice aforethought," the first degree must contain something more. And what is that further ingredient? So far as we have been able to ascertain, from the limited libraries within our reach, in all the States where there are grades of murder, the first degree is defined to be of deliberate as well as premeditated malice. The common agreement of mankind, therefore, has attached a significant importance to the term "deliberate," in defining the malice of murder. Webster's Dictionary defines it thus: "Deliberate, *a.* 1. Weighing facts and arguments with a view to a choice or decision; carefully considering the probable consequences of a step; circumspect; slow in determining. 2. Formed with deliberation; well advised or considered; not sudden or rash; slow." The term

necessarily implies time for cool examination, and a fixed purpose to execute what is designed ; while premeditation does not go so far. To think upon, or meditate an act, does not necessarily imply a calm and settled resolve to execute it ; it suggests only such an intention as may, or may not be carried out, owing to future circumstances.

*Attorney-General for Respondent.*

TERRY, C. J., delivered the opinion of the Court—FIELD J., concurring.

Defendant was tried and convicted on an indictment charging him with the crime of murder in the first degree. The points taken by appellant are :

1. "The indictment wrongly attempts to fix or designate the degree of murder."

2. "It is insufficient in its statement of the acts and circumstances necessary to constitute the offence therein charged."

3. "It does not contain a sufficient charge to predicate thereon a verdict of murder in the first degree."

The first objection is frivolous. It is certainly not necessary that the grand jury should designate the degree of murder, though there is no impropriety in their doing so. Nor is it perceived in what manner the defendant is prejudiced by this act. Under an indictment charging murder, the trial jury are required to designate the degree of guilt, and may find any offence included in the charge, and they have equally this privilege if the indictment charge murder in the first degree, as the offence of murder in the second degree and manslaughter are necessarily included in it.

The second objection is not well taken. We have held that the substantial facts necessary to constitute the crime charged, must appear in the indictment with sufficient certainty to enable the Court to pronounce a proper judgment, and the party to defend against the charge.

But it is not necessary that they should be stated with the particularity which was required at common law.

It is sufficient if a man of ordinary intelligence can understand from the indictment, that, under such circumstances as show a felonious intent, a mortal wound was inflicted by the defendant upon the deceased, of which wound he died within a year and a day from its infliction.

The third objection is founded on the absence of the word "deliberate," which the applicant contends is necessary to constitute the crime of murder in the first degree.

The indictment charges the act to have been done with malice aforethought. Aforethought, as defined by Webster, means premeditated ; premeditate and deliberate are synonymous. The

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definition given of murder in the statute is, "the unlawful killing of a human being with malice aforethought, expressed or implied." This definition includes both degrees of murder, and it is sufficient if the indictment charge the offence in the language of the statute defining it. (*People v. Parsons*, 6 Cal., 487.)

Judgment affirmed, and the Court below directed to appoint a day for the execution of its sentence.

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### NASH v. HERMOSILLA.

Where A agreed with his tenant, who was occupying a wooden building, that if he would give up his lease, A would erect a brick building, to cover such portion of the lot as would be satisfactory to the tenant, and would give him possession within three weeks, and a lease of the premises for six months, with the privilege of twelve months, or on failure so to do, would pay the tenant five hundred dollars damages: *Held*, on breach of the contract on the part of A, that the sum named was a penalty, and not liquidated damages.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

This was an action for damages upon a breach of contract on the part of defendant. The plaintiff was a tenant of defendant, occupying a wooden house, and defendant wishing to erect, on the lot so occupied by plaintiff, a brick building, made with the plaintiff the following written agreement:

"Know all men by these presents, that I, Rosa Hermosilla, of Sacramento city, California, in consideration of the giving up of a lease, now held by John Nash, of same city, to a wooden building situated on J street, south side, No. 220, next to the corner of Eighth street, owned by me, do promise, well and faithfully to perform, to wit: erect a brick building to cover the lot, or such portion of lot, now occupied by aforesaid Nash, as will be satisfactory to him, and the said Nash to have possession within three weeks; and on completion, the aforesaid party is to have possession for six months, with the privilege of twelve months or more, and in case of failure on my part to fulfill my promise as above, I will pay the said Nash the sum of five hundred dollars damages. (Signed) ROSA HERMOSILLA.

"Witness, THOS. M. SMITH."

The plaintiff accepted the contract, and vacated the premises. The building was not completed within the agreed time, and plaintiff was kept out of possession for the period of three weeks beyond the time agreed upon.

The case was tried in the Court below before a jury. The jury failing to agree upon a verdict, by consent a verdict was returned in favor of plaintiff for one dollar's damages, subject to the opinion of the Court, whether the sum stated in the instrument sued upon, was for liquidated or unliquidated damages. The Court decided that the amount named was not liquidated damages, and plaintiff appealed.

*J. H. McKune* for Appellant.

The obligation sued on is for liquidated damages, to be paid absolutely if she failed.

In *Aylett v. Dodd*, 2 Atk., 238, the words were, "if either of the payments should be in arrear forty-two days after it became due, then five shillings per week was allotted by way of *nomine pena* : *Held*, the whole penalty should be collected.

In *Lowe v. Pells*, 4 Burrows, the words were, "I do promise said Catherine Lowe that I will not marry with any person besides herself; if I do, I agree to pay to said Catherine one thousand pounds : *Held*, that the jury could find neither more nor less damages than one thousand pounds."

In *Fletcher v. Dyck*, 2 Term Reports, 32, the obligor bound himself to perform ironmonger's work mentioned in a certain estimate, and to provide all the material thereof within six weeks, at a fixed price, and if the obligor should make default, or should neglect to do the said smith's and ironmonger's work, within the time limited, the obligor should well and truly pay the sum of ten pounds for every week, etc. : *Held*, damages were liquidated.

In *Green v. Price*, 13 Meeson & Welsby, 695, B covenanted not to carry on the trade of perfumer in London, nor within six hundred miles of London, and for the observance of his covenant he bound himself in the sum of five thousand pounds liquidated damages : *Held*, that the covenant was devisable, and was good, so far as it related to London, though void as to the six hundred miles, and that a branch where defendant carried on the trade of perfumer in the city of London entitled the plaintiff to recover the entire sum of five thousand pounds.

In *Barton v. Glover*, the words were, "each party agrees to bind himself to the other, in the sum of five hundred pounds, to be considered and taken as liquidated damages : " *Held*, the whole must be received for breach.

In *Slasson v. Bradle*, 7 John., 72, the defendant, in consideration of five hundred dollars, received for fifty acres of land, agreed with the plaintiff to convey said land by good warranty deed before the first of August then next ensuing, or in lieu thereof to pay the plaintiff eight hundred dollars : *Held*, liquidated damages.

In *Smith v. Smith*, 4 Wendell, 468, the plaintiff declared on a

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bond in the penal sum of ten thousand dollars, dated April 12, 1827, conditioned that the defendant would not locate himself and practice as physician and surgeon in a certain village named, for the space of ten years, and if he should so locate or practice, he would pay the plaintiff on demand five hundred dollars for each and every month he should so practice: *Held*, that the damages were liquidated.

In *Williams v. Dakin*, 22 Wendell, 201, the plaintiff gave three thousand dollars for the good-will of a newspaper, and five hundred dollars for types and printing apparatus, and the vendors (defendants) covenanted that they would not publish, or aid, or assist in publishing, a rival paper, and fixed the measure of damages at three thousand dollars for a violation of their covenant.

In the above-mentioned case, the doctrine of liquidated and unliquidated damages was much discussed, and it is submitted that the case of *Nash v. Hermosilla* falls clearly within the rule laid down in *Williams v. Dakin*.

In the case of the California Steam Navigation Company against Wright, 6 Cal. R., 258, the case of *Williams v. Dakin* is cited and approved, and an agreement, nearly in the same terms used in the bond sued on in this case, is held to be for liquidated damages.

*Cross & Marshall for Respondent.*

1. When several covenants are to be performed, and a large sum is named at the end of the covenants to be paid upon the breach of performance of either, it must be considered as a penalty. Chitty on Contracts, 758; 2 Greenleaf on Evidence, 268, § 258.

The sum of \$500 was intended as collateral security for the faithful performance of the several promises mentioned in the agreement, and must be considered as a penalty. *Moore v. Platte Co.*, 8 Missouri, 267; 2 Greenleaf's Evidence, 268, § 258.

The intention of the parties was to secure to the plaintiff the possession of the brick store within a reasonable time, which was the principal object, and the enjoyment of that object must be considered as the principal intent of the agreement, and the \$500 a penalty. *Spencer v. Tilden*, 5 Cowen's Rep., 144, and note B on p. 150; *Dennis v. Cummins*, 3 Johns. Cases, 297.

When a sum of money in gross is to be paid for the non-performance of an agreement, it is considered as a penalty. *Taylor v. Sandiford*, 7 Wheaton, 13.

The only breach assigned by the plaintiff is that the defendant failed to give him possession in three weeks, then the only damage sustained by the plaintiff would be the amount of rent that he paid, above the amount he agreed to pay the defendant during the time he was kept out of possession beyond the three weeks mentioned in the agreement. That amount a jury could

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ascertain with a reasonable certainty, therefore the gross sum of \$500 must be considered as a penalty. *Hoag v. McGinnis*, 22 Wendell, 163; *Spear v. Smith*, 1 Denio, 464.

The gross sum of \$500 mentioned, will not, of course, be considered as liquidated damages, and it will be incumbent on the party claiming them as such, to show that they were so considered by the contracting parties. This has not been shown, and the amount stated must be considered as a penalty. *Tayloe v. Sandiford*, 7 Wheaton, 13.

In general it is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty, and not as liquidated damages, because then it may be apportioned to the loss actually sustained. *Moore v. Platte Co.*, 8 Missouri Rep., 467.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The cases upon this subject are numerous, and it is difficult to deduce from them any certain and definite rule. In fact, the transactions of individuals are so various, and the circumstances of many cases so peculiar, that no certain rule can be adopted for all cases. But, from the decisions, the following results seem to be substantially correct:

1. When the party stipulates to pay a stated sum for a given period of time during the continuance of the failure, then the damages are to be considered as liquidated. (*Aylet v. Dodd*, 2 Atk., 238; *Fletcher v. Dyck*, 2 Term R., 32; *Smith v. Smith*, 4 Wend., 468.)

2. When the agreement is not to carry on trade at a particular place; not to run a stage-coach on a particular road; not to publish a rival newspaper; not to run a rival steamer on a particular route. In all these cases, the sum stated must be taken as liquidated damages. (*Green v. Price*, 13 Meeson & W., 695; *Leighton v. Wales*, 3 ib., 545; *Williams v. Dakin*, 22 Wend., 401; *Cal. Steam Nav. Co. v. Wright*, 6 Cal., 258.)

3. When the party stipulates to marry no other person; to convey land or pay a named sum, the price of the land having been received by him; the damages are liquidated. (*Lowe v. Peers*, 3 Burr., 225; *Slasson v. Beadle*, 7 John., 71.)

4. When a named sum is to be paid for every acre of land ploughed up contrary to agreement; when a stated sum is to be paid for each article not delivered; the damages must be considered as liquidated.

5. When the party stipulates to erect a building in a particular manner, within a given time, and upon failure to pay a named sum, it must be considered in the nature of a penalty. (*Tayloe v. Sandiford*, 7 Wheaton, 13; *Moore & Hunt v. Platte County*, 8 Mo., 467.)

In *Taylor v. Sandiford*, Chief Justice Marshall said : "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. \* \* It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them to show that they were so considered by the contracting parties."

The present case seems to fall within the rule applicable to building contracts. In this case, the defendant stipulated that she would erect a brick building to cover such portion of the lot as would be satisfactory to plaintiff, and give him possession within three weeks; the plaintiff to have possession for six months, with the privilege of twelve months, or more; and upon failure to perform the agreement, she was to pay to plaintiff the sum of five hundred dollars damages.

It will be seen that there are several things for the defendant to do, a failure to perform any one of which would have been a violation of the agreement. If the building had been erected upon a portion of the lot not satisfactory to the plaintiff, or the house not finished for a single day beyond the stipulated time, the defendant would have been liable for the whole sum, upon the theory of the plaintiff's counsel. So, too, if the plaintiff had been disturbed in his possession for one day, during the term of six months, or denied the privilege of the additional term. There is no statement in the agreement that the sum was to be taken as liquidated damages. If the defendant had failed to erect a suitable brick building, although finished within the time specified, it would have been a violation of the contract.

We are of opinion that the damages mentioned were not liquidated, but a mere penalty to secure the performance of the contract, or the payment of such damages as the plaintiff might be entitled to under the circumstances. In building contracts, it may be difficult to say what amount of injury the plaintiff has sustained by reason of the non-completion of the building within the exact time stated. And yet this difficulty in ascertaining the amount of the injury occasioned by the delay, has not induced the Courts, in such cases, to consider the sum as liquidated damages.

Judgment affirmed.

O'KEIFFE *et al.* v. CUNNINGHAM *et al.*

One party may locate ground in the mineral districts for fluming purposes, and another party, at the same or a different time, may locate the same ground for mining purposes; the two locations being for different purposes, will not conflict.

A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another; but in that case, his mining right will be subject to the prior right of deposit.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

This was an action of trespass, brought by the plaintiff against the defendants, for discharging their tailings on the mining-claims of plaintiffs. The complaint alleges that plaintiffs were lawfully possessed of seventeen mining-claims; that such possession dates from the third day of April, 1856; that while so possessed, defendants discharged through a flume, large quantities of water and tailings upon the ground of plaintiffs, and thereby covered up and incumbered their mining-claims, etc.

The defendants deny the allegations in plaintiffs' complaint, and set up prior location, and right to discharge such tailings upon the ground occupied by plaintiffs. The facts, sufficient to elucidate the points decided by the Court, appear in the opinion of the Court. Trial was had before a jury, the defendants had verdict and judgment. Plaintiffs moved for a new trial, which was denied, and they appealed.

*Dunn & Rowe* for Appellants.

*McConnell & Dibble* for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

An opinion was delivered in this case at the April Term, 1857, and a re-argument had at the succeeding July Term. The judgment was considered erroneous in consequence of the admission of certain testimony. The defendants' counsel, in answer to the objection to the admission of this testimony, insisted that no exception had been made by the plaintiffs in the Court below. This was his only answer to the objection. The counsel had overlooked the fact that an exception had been taken. But upon the re-hearing we became satisfied that the testimony in reference to the other flume was admissible for the purpose of showing that the gravel and other refuse matter, (called, in the technical language of the mines, tailings,) deposited upon the

alleged claims of plaintiffs, were placed there, at least in part, by other parties, with whom defendants had no connection.

This leads us to consider the other points made by the plaintiffs.

The Court refused to give the third and eighth instructions offered by plaintiffs. The third instruction was properly refused; and the refusal of the eighth, relating to the measure of damages, did the plaintiff no injury, as the jury found a general verdict for the defendants.

The only remaining point is, that the Court erred in refusing to grant a new trial, upon the ground that the verdict was against law and evidence.

The testimony, as spread upon the record, is voluminous, and yet concisely stated. The facts of the case were complicated; and, at first view, there would seem to be a conflict of testimony. We have given the record the most patient consideration, and we can not see any material conflict in the testimony of the different witnesses, as to the main facts.

The plaintiffs introduced evidence to show that they owned two sets of claims—the upper and lower; the first located in 1851, and the second in July, 1855. In August, 1855, Clark commenced the construction of a flume, called Clark's Flume, near the lower end of the second set of claims. He was forbidden by the plaintiffs, and thereupon plaintiffs and Clark subsequently entered into a written article, by which it was agreed that Clark should have the privilege of entering upon the mining-claims of plaintiffs, and erect upon and over the same a water-flume, so as to carry the water and tailings flowing from Clark's claims, located above, across the claims of plaintiffs, but not to interfere with the working of the same, in any manner, and not to deposit thereon any tailings. Clark afterwards sold his flume to defendants, who entered under the purchase.

The defendants coming in under purchase from Clark, obtained only the right that Clark possessed, and were bound by the compromise made by him with plaintiffs. The defendants entered in subordination to the title of plaintiffs, and were bound accordingly. (*Ellis v. Jeans et al.*, 7 Cal. Rep., 409.) The Court very properly instructed the jury in regard to this point.

The next inquiry was as to what constituted the "mining-claims belonging" to plaintiffs at the date of the article, thirtieth August, 1855, within the meaning of the instrument.

It seems perfectly established that Frany & Walker located the lower set of claims on the fifth of July, 1855; but they only located for what is called fluming purposes. The Court very properly instructed the jury that one party may locate the same ground for fluming purposes, and another party, at the same or a different time, may locate for mining purposes, and the two locations, being for different purposes, will not conflict.

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The plaintiffs proved by Forbes that they located the lower set of claims in July, 1855, and before Clark commenced the construction of his flume; and that the claims were staked off and recorded. The statements of this witness are clear and explicit affirmative evidence, uncontradicted by other witnesses, and consistent in itself. And not only so, but it is confirmed by facts stated by Clark, a witness for both parties; as Clark says that when he commenced his flume, plaintiffs claimed to own both the upper and lower sets of claims.

Then, as to the fact that defendants, after the purchase from Clark, exceeded the limited rights they purchased, by flowing water, and depositing tailings upon the lower claims of plaintiffs, to their injury, it seems too clear to admit of any reasonable doubt.

As to the question, whether the plaintiffs included within their limits more ground than they were entitled to under the rules and regulations of that locality, the defendants, coming in under Clark, were not in a situation to raise it.

The jury seems to have been misled by the fact that the Union Company had been in the habit of depositing the tailings from their flume upon the lower claim of plaintiffs since 1854. From this they seem to have inferred the right of defendants to do the same thing. But such a conclusion does not follow. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another, and his mining right may be subject to this prior right of deposit; but the claim of the miner will not be subject to those who come after him.

We always feel great reluctance to disturb the verdict of a jury. But in this case, we are compelled to say, the plaintiffs are entitled to a new trial.

Judgment reversed, and cause remanded.

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### KENDALL v. MILLER *et al.*

The guardianship by nature extends only to the custody of the person of the ward, and not to his property. To entitle the guardian to manage the property of his ward, he must be duly appointed by some competent public authority.

A guardian can not sell even the personal property of his ward without an order of Court.

In the acknowledgment of a married woman to a deed, there must be a privy examination.

A justice of the peace can not take and certify the acknowledgment of a married woman.

It must be done by a Justice of the Supreme Court, Judge of a District Court, County Judge, or notary public.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

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A statement of the facts, sufficient to understand the points decided, appears in the opinion of the Court.

*Francis J. Dunn* for Appellant.

*W. S. Spear and R. H. Taylor* for Respondents.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

L. W. Sanders died, leaving a widow, and three children under age, the issue of the marriage. The widow afterwards intermarried with A. Husted, who used some of the property of the infant heirs. For the purpose of compensating the children, he conveyed to their mother, in trust for them, a certain proportionate interest in certain mining-claims. One of the children, having intermarried with McKay, united in a deed with her mother, conveying the property to the plaintiff. The defendants claimed under a subsequent sheriff's sale. The case was tried before the Court sitting as a jury; a nonsuit was entered, and the plaintiff appealed.

It is not necessary to the decision of this case, to determine whether the husband could convey the property to his wife, in trust, for the benefit of the children of the former marriage.

By the fifth section of the act for the appointment of guardians, (Wood's Digest, 427,) the father of the minor, if living—and, in case of his decease, the mother, while she remains unmarried—being competent to transact their own business, shall be entitled to the guardianship of the minor. The guardianship mentioned by this section is that which is contemplated, and the duties and powers of which are prescribed by the act itself.

The guardianship by nature extends only to the custody of the person of the ward, and not to his property. But to entitle the guardian to manage the property of his ward, he must be duly appointed by some competent public authority. (2 Kent, 218; 6 Georgia Rep., 404.) So, guardianship by nurture extends only to the person, and determines when the infant arrives at the age of fourteen. (2 Kent, 221.)

The sale of the property by Mrs. Husted, conveyed no title to the purchaser. A guardian can not sell even the personal property of his ward without an order of Court. (§ 19.)

The interest of Mrs. McKay did not pass by the deed, as it was not properly acknowledged. There was no privy examination, and it was acknowledged before a justice of the peace, when it could only be acknowledged before a Justice of the Supreme Court, Judge of the District Court, County Judge, or notary public. (Wood's Digest, 488, § 6; *Selover v. Russian Am. Com. Co.*, 7 Cal. 266.)

A married woman may, no doubt, execute a power of author-

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ity without her husband. (Reeves' Domestic Relations, 120.) But if she be a trustee for infants, she can not dispose of the trust-property, except by the order of the proper Court. The infants can not give a binding consent, and the Court is bound to protect their rights.

We see no error in the decision of the District Court, and the judgment is, therefore, affirmed.

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POOLE AND WIFE v. GERRARD *et al.*

In an action in which a homestead right is asserted, in which an issue of fact is made as to the marriage of the parties claiming to be husband and wife, the declarations of the alleged wife to the effect that she is not married, are admissible in evidence.

Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so.

But where such evidence is offered simply to prove the fact that a writing was made in reference to the matter in controversy, without stating the contents of the same, it is admissible.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The facts appear in the opinion of the Court.

*J. B. Hart* for Appellants.

*Sidney V. Smith* for Respondents.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

This was an action to recover certain premises, alleged by plaintiffs to be their homestead. The defendants claimed the premises under separate deeds from plaintiffs. The trial was had before a jury, and the main issue was the marriage of the plaintiffs. Verdict for defendants; motion for new trial overruled, and plaintiffs appealed.

1. The first point made by the plaintiffs is, that the Court erred in admitting in evidence the separate deeds of the plaintiffs, to the defendant Gerrard, to the premises in question. The plaintiffs based their right to recover entirely upon the question of homestead; and the separate deeds of the plaintiff were immaterial under the issues made by the pleadings. But, from the record, we can not perceive how the plaintiffs were injured. It is stated that the Court charged the jury, but the instructions given are not found in the record; and we must presume that the

Court gave proper instructions. With proper instructions, the admission of the deeds could do the plaintiffs no harm.

2. The second objection made by plaintiffs' counsel goes to the admission of parol proof of the contents of a written agreement, without first laying the proper foundation. The main question being the marriage of plaintiffs, to sustain the issue on their part they proved that they had lived together as husband and wife, and were so considered by the community in which they lived. To rebut this proof, the defendants proved the declarations of Helen Poole that they were not married; and then proved by the same witness that Helen Poole had shown to the witness a written contract between the plaintiffs; that witness read the contract; and that it was a contract for plaintiffs to live together as long as they could agree. The plaintiffs objected to the introduction of this proof, without the proper notice to produce the writing itself. The objection was overruled, and proper exception taken.

The four hundred and forty-seventh section of the Code provides that "there shall be no evidence of the contents of a writing other than the writing itself, except in" the cases mentioned. The second exception stated is, where "the original is in possession of the party against whom the evidence is offered, and he fails to produce it, after reasonable notice."

Where parol testimony is offered, simply to prove the fact that a writing was made in reference to the matter in controversy, without stating the contents of the same, it is admissible, if relevant, under the circumstances of the particular case. But, when it is sought to prove the stipulations contained in the writing, the parol evidence is not admissible, without first taking the proper preliminary steps. The Code is very explicit, that you shall not prove the *contents* of the writing other than by the writing itself, except in the cases mentioned.

The counsel of defendants insists that the contents of the contract proved by the witness were merely collateral, and, therefore, inadmissible. To sustain his position, he refers us to the cases of *Tucker v. Welsh*, (17 Mass. Rep., 164,) and *McFadden v. Kingsbury*, (11 Wend., 667.)

In the first case cited the decision of the point was not necessary, and the language of the opinion was mere *dictum*. This *dictum* has been questioned by very high authority. (2 Cowen & Hill's notes to Phil. on Ev., 400.) In the second case, it was not necessary to prove the notice at all; and it is not perceived how rejecting the oral proof of the contents of the written notice could have been error. And it may be remarked that, in stating the exception to the general rule, requiring the production of the writing itself, Professor Greenleaf, in section eighty-nine of his very accurate work on evidence, is very careful not to put

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in the text the two instances found in the cases cited above, but simply refers to them, without comment, in the notes.

The true rule is stated in 2 Cowen & Hill's notes, on page 401, with great clearness: "So, where the transaction, or matter to which the writing relates, may be proved entirely independent of it, yet, if the contents are inquired after, it must be produced; for, as to these, it is the best evidence."

The contents of the written contract between the plaintiffs were most material to the main issue in the case, and these contents could only be known from the writing. The knowledge of the witness was derived from the writing itself. The mere fact that there was a contract between the parties could avail the defendants nothing, without proof of its contents; and the best proof of these contents was the writing itself. No notice to produce the writing having been first given, the Court below erred in permitting proof of its contents to go to the jury.

3. The third point made by the plaintiffs is, that the Court erred in admitting in evidence the declarations of Helen Poole, to disprove the *prima facie* case made by the plaintiffs. We think there was no error in this. (*Jewell's Lessee v. Jewell*, 1 How. U. S. Rep., 219.)

For the reason stated the judgment must be reversed, and the cause remanded for further proceedings.

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### COLTON *et al.* v. ROSSI *et al.*

A municipal corporation can not take private property for public use, without making compensation in advance or providing a fund out of which compensation shall be made as soon as the amount to be paid can be determined.

And if failure be made in paying or providing such compensation, the party may retake possession of his property.

A town whose act of incorporation has been decided to be unconstitutional by the Supreme Court, has no legal existence as a corporation, and a judgment against it would be a mere nullity.

APPEAL from the District Court of the Eighth Judicial District, County of Siskiyou.

A statement of the facts appears in the opinion of the Court.

*Robinson & Beatty* for Appellants.

*Latham & Sunderland*, on the part of Appellants, made the following argument:

1. Upon the admission of California into the Union, formed from territory of the United States, acquired by the treaty of

Guadalupe Hidalgo, the right of eminent domain passed to the State, and nothing remained in the United States but the public lands. *Pollard v. Hagan*, 3 How. U. S., 212.

2. Respondents insist that their private property can not be taken for public use without an actual payment in cash to them of its value. Appellants say, on the contrary, that the corporated authorities had a right to so dedicate their property to public use by making provision for their payment, and an actual payment was not necessary.

A payment to respondents of \$270, and auditing their assessed damages, their acceptance of that sum and allowance of auditing their damages was a waiver of their rights in the premises.

Appellants contend that "private property may be taken for public use if provision is made for the assessment and payment of damages, though payment be not made." *Mercer v. McWilliams Wright*, 1 Ohio, 132; *Rubottom v. McClure*, 4 Blackf., 505; *Pittsburgh v. Scott*, 1 Penn. State, 309; *Jackson v. Winn*, 4 Litt. Ky., 323; *Bates v. Copper*, 5 Hammond, Ohio, 115; *Young v. Buckingham*, 5 Hammond, Ohio, 485; *Willyard v. Hamilton*, (part 2) 7 Hammond, Ohio, 112.

But respondents say that under the ruling of your Honorable Court, in case of *The People ex rel. the Attorney-General v. The Town of Nevada*, 6 Cal. Rep., 143, that the Town of Yreka could not be incorporated under the provisions of the act of 27th of March, 1850, the same being unconstitutional.

Are not the acts of such trustees valid *de facto* if not *de jure*?

Appellants say that the dedication of the property of respondents for public uses was a ministerial act, and as such is valid and binding. It is valid as the act of a corporation acting *de facto*, if not *de jure*.

Kent, in his Commentaries, vol. 2, page 339, says: "In the case of public officers, who are such *de facto* under color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in the case of sheriffs, constables, etc., their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice."

This doctrine has been repeatedly adjudged, and it is now a well-settled principle of law that "the acts of officers *de facto*, are as effective as far as the rights of third persons or the public are concerned, as if they were officers *de jure*." *Burke v. Elliot*, 4 Iredell, 355; *Gilliam v. Reddick*, 4 Iredell, 368; *Schlencher v. Pixley*, 3 Scam., 483; *People v. Collins*, 7 Johns., 549; *McInstry v. Tanner*, 9 Johns., 135.

*P. L. Edwards* for Respondents.

The respondents could not be divested of any of their rights

by means of the acts of the trustees or of their commissioners for the reasons:

1. That if the law under which they are alleged to have been incorporated was that of the 11th of March, 1850, then no such officers as trustees are recognized, but it provides expressly that "for the government of every city incorporated under this act there shall be a mayor, recorder, and common council to assist, etc." The provision is for councilmen and not for trustees. Compiled Laws, 102, § 7.

2. If the incorporation was sought under the act of the 27th of March, 1850, then under the act they had no power to do the acts in question. Compiled Laws, 115, § 6.

3. Had these trustees been duly incorporated under a constitutional law, they could only have appropriated the private property of the respondents to the public use according to the directions and requirements of such law. They could not themselves appoint the appraisers of the property which they had determined to take, for this would be to a great extent the trying of their own case; but they should have applied to the County Court, which could, under the terms of the law, make the appointments. Compiled Laws, 104, §§ 14-18.

So that even according to the statute, the whole proceeding was extra official and void.

4. The act itself, as already determined by this Court, is wholly unconstitutional. The power to create such a corporation is legislative, and can not be conferred upon the County Court. *The People v. Nevada*, 6 Cal. R., 143.

There was no divestiture of the respondents' title. The proceedings had all been irregular, and there had been no acceptance of the proffered compensation.

If the proceedings had been merely voidable, instead of absolutely void, there was no act, on the part of the respondents, to satisfy them. Within two months after the appropriation of the land by the trustees, the respondents brought an action, in the nature of trespass, against them, in which they recovered damages and costs for about thirteen hundred dollars, of which only about two hundred and seventy dollars were ever paid. Instead of receiving compensation for their land, the respondents have been denied all but a small part of the damages thus actually adjudged to them.

If the damages in that action were excessive, or if at the trial there occurred any error, there was a remedy by direct appeal, and by that only. If that action was against a supposed corporation, which in fact has no existence, as is in fact most manifest, then the whole, judgment and all, was an entire nullity, and can have no effect whatsoever upon this, or any other proceeding.

There was no corporation either to give compensation or to take the land—and all is null and void. The compensation must

have been made upon a proceeding in the regular course of law, before the appropriation to the use of the public. *Com. Laws*, 105, §§ 17-18; *San Francisco v. Scott*, 4 Cal. R., 114; *McCann v. Sierra County*, 7 Cal. R., 121. And the compensation must be in money; any other equivalent will be insufficient. *Commonwealth v. Peters*, 2 Mass. R., 125.

There is no pretence of any grant from the respondents; and if there had been one, in all respects regular in form and manner of execution, still there was none to take; for it was no corporation. The last hope of a reversal of this judgment, then, rests in the assumption that there was a dedication by the respondents to public uses—and if such dedication is sustained, it must be by the express fact set forth in the case that the appropriation and use of the land by the public was without the consent of the respondents. There can be no dedication presumed against the express dissent of the owner of the land. Chancellor Kent, after a review of the cases, concluded thus: "The true principle to be deduced from the authorities, I apprehend to be, that if there be no other evidence of the grant or dedication than the presumption arising from the fact of acquiescence on the part of the owner, in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required, as being the usual period of limitation. But if there were clear, unequivocal, and decisive acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment and dedication of the land, those acts would be sufficient to establish the dedication within any intermediate period, and without any deed or other writing." 3 Kent's *Comm.*, 451. There can here be presumption of a grant, or dedication from the lapse of time or continuous user.

The remaining question, then, is: are there any acts of the respondents evidencing a clear, unequivocal, decisive and explicit intention of permanent abandonment and dedication of the land? A negative answer is enforced by every fact in the case. The respondents almost immediately sued for the trespass—and the statement, as before mentioned, shows that the appropriation and user was against their consent. There can be no room for a presumption of consent where there is affirmatively shown to have been an express dissent. In Massachusetts it has been held that "A town may acquire a right of way by grant; and exclusive, uninterrupted user by the inhabitants for twenty years, unexplained, is evidence of a grant, but such way will be a private way, and a nuisance on it will not be indictable. A public town-way can be established only in the mode prescribed by statute; and a record of the establishment of such a way can not be presumed from any user or length of time." *Commonwealth v. Low*, 8 Pick. R., 402.

In that State, the Courts were long reluctant to recognize the

doctrine of a dedication of a right of way in any manner. *Hinkley v. Hastings*, 2 Pick. R., 162.

Although the English cases are more favorable to the presumption of such dedications than those of Massachusetts, yet they are more than abundantly sufficient to exclude such a presumption here. *Moody v. Hayden*, 1 Eng. Com. L. R., 74; *The King v. The Inhabitants of St. Benedict*, 6 do., 158; *Wood v. Veal*, 7 do., 158.

The principal authorities, English and American, are collected and reviewed in 2 Smith's Leading Cases, 176, 180.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The town of Yreka was incorporated on the fifth of May, 1854, under the act of the Legislature of March 27, 1850. On the fourteenth of June, 1854, the board of trustees passed an ordinance for the opening of a street through the premises of defendants. The board appointed appraisers, who estimated the value at \$750. This sum was tendered to defendants, but the same was refused. The defendants afterwards brought suit against the corporation to recover the damages occasioned by the appropriation of their property, in which they obtained judgment for \$1050. An order was drawn upon the treasury of the town for the whole amount, including the costs; and the sum of \$270 was paid, and endorsed upon the order as a payment. The remainder not having been paid, the defendants took possession of the street. This suit was brought by the plaintiffs, who owned property upon the street, to restrain defendants from erecting buildings, which would close up the street and obstruct the approach to plaintiffs' house of business. Upon this state of the case, the Court below decided that the plaintiffs were not entitled to any relief, and the plaintiffs appealed.

In the case of *McCann v. The County of Sierra*, (7 Cal. R., 121,) we held "that compensation must be made in advance, or a fund must be provided, out of which compensation must be made so soon as the amount can be determined. The property of the citizen can not be taken from him without ample means of remuneration are provided."

The compensation in this case was not made in advance, and there was no fund provided out of which the same could be paid when the amount was determined. The town was incorporated under an act decided by this Court to be unconstitutional; and the incorporation was void. (*The People v. The Town of Nevada*, 6 Cal. R., 143.) The defendants had no power to obtain payment, as their judgment against a supposed corporation, having no legal existence, was a mere nullity. The fund supposed to be provided, had no legal existence, as the authority creating it

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had none. The only thing the defendants could do was to take possession of the property.

Judgment affirmed.

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McGEE *et al.* v. STONE *et al.*

Where two several mining companies agree upon a boundary-line between the claims of the two companies, and, subsequently, other parties purchase the several interests of the two companies, with a knowledge of the boundary-line so fixed, both parties are concluded by it, and are estopped from denying the line.

The fact that such line was fixed by a mistake as to the true boundaries and corners, makes no difference, as the subsequent purchasers purchased with a view to this line.

APPEAL from the District Court of the Fourteenth Judicial District, County of Sierra.

A statement of the facts appears in the opinion of the Court.

*William Stewart and A. Platt* for Appellants.

The evidence shows that the stake was stuck at "B," after due deliberation, and was afterwards recognized by a long series of acts; that both parties had equal means of information, and that all of the present members of the Star Point Company have purchased in good faith, with a stake standing at "B," written upon, in the handwriting of Delancy, to the effect that it was on the dividing line.

The learned commentator, Judge Story, says, that "where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances, in such cases equity will not relieve." Story's Equity, 149.

The same author, in another place, holds the following language: "It is not sufficient, in all cases, to give the party relief, that the fact is material, but it must be such as he could not, by reasonable diligence, get knowledge of; for, if by such reasonable diligence, he could have obtained knowledge of the fact, equity will not relieve him." 1 Story's Equity, 146.

The defendants, so far from being allowed to excuse their conduct by mistakes, ought to be estopped from denying "A B" to be the true line. They have induced us to purchase on the faith of their acts and declarations, and they ought to be allowed to contend that they have acted falsely from the beginning. *Hastler v. Hays*, 3 Cal., 306.

In the last-named case, the Court says, that "The sense of estoppel is, that a man, for the sake of good faith and fair deal-

ing, ought to be estopped from saying that to be false, which, by his means has become accredited for truth, and by his representations has led others to act."

And upon this point, Professor Greenleaf lays down the following rule:

"Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases, between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself, or implied from the open or general conduct of the party. For in the latter case, the implied declaration may be considered as addressed to every one in particular who may have occasion to act upon it. In such cases, the party is estopped, on grounds of public policy and good faith, from repudiating his own representations." 1 Greenleaf on Evidence, § 207.

"It makes no difference in the operation of this rule whether the thing admitted was true or false, it being the fact that it has been acted upon that renders it conclusive." Ibid., § 208.

See, also, 2 Cowen & Hill's Notes to Phillipps on Evidence, 202, et seq.; 3 Selden, 218.

In *Rockwell v. Adams*, 7 Cowen, 761, the Court hold that a practical location by a party, or his recognition of a line giving him less land than the actual courses and distances in his deed, may be valid, though he does not know at the time that it will have such an effect. To bind him, there need not be an express agreement. Acquiescence for a length of time, is evidence of such agreement; and where the lines are acquiesced in for a number of years by all interested, it is conclusive evidence of an agreement to the line.

In *The Same v. The Same*, reported in 6 Wend., 467, the Court holds that the acts and declarations of parties, as to the location of lands, may control the courses and distances in their deeds; and to give operation to such acts and declarations, it is not necessary that their effect should be known to the parties. See, also, *Jackson v. Jackson*, 4 Cowen, 450.

In the case at bar, the defendants established their line, and marked it in a distinct and conspicuous manner, and after nearly two years, which is longer, comparatively, in a mining locality, than twenty years is among farmers, where innocent parties had purchased and discovered gold, changed their lines so as to include the lead, and now say that they were mistaken.

*Jackson v. McConnell*, 12 Wend., 421, is also in point. In that case, the Court say that the charge of "the (Circuit) Judge was not altogether accurate. It was calculated to impress upon the jury, that the rule of law was, that the plaintiff was not bound by the location, if it was erroneous in any respect, unless he knew of the error at the time, and expressly agreed to be bound

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by it." This was the precise error of the Judge, in *Rockwell v. Adams*, 7 Cowen, 762, and for which a new trial was granted. The true rule will be found in that case. It is subsequently recognized in 6 Wendell, 467, and in *McCormick v. Barnum*, 10 id., 105; *Van Wyck v. Wright*, 18 Wendell, pp. 157, 168.

A similar principle is decided by this Court, in *Bell v. Meehan*, 2 Cal., 160, in which the Court say: "Mistake, or ignorance of fact, is said to be the proper subject of relief, when the fact constituted a material ingredient in the contract of the parties, and disappoints their intention by mutual error, or where it is inconsistent with good faith. But when each party is innocent, and there is no concealment of facts which the other party ought or has a right to know, and no surprise or imposition exists, the mistake, whether mutual or unilateral, is treated as laying no foundation for equitable interference, and is strictly *damnum absque injuria*."

#### *McConnell & Niles for Respondents.*

This was an action of ejectment to recover possession of mining-claims.

The errors alleged which will require the consideration of this Court, are contained in the instructions given, at the request of defendants, in the Court below.

1. The principle contained in several of these instructions, may be stated as follows:

That the admissions of an individual member of a mining company, in regard to the boundaries and extent of the company's claims, are not conclusive evidence against the company, of the truth of the facts admitted.

The theory upon which these instructions were given, is this: that several part-owners of mining-claims are tenants-in-common of the ground; and one tenant-in-common can not bind his co-tenants by admissions in regard to the extent of the common property.

It might well be contended that members of a mining company are not to be considered, in any respect, as partners. They are not engaged in trade. They neither buy nor sell. The interest of each member is transferable at his will, without working any dissolution of the company.

But it is not necessary to consider at length the relation which the members sustain toward each other, in regard to the objects of their connection and the nature of their interest in the profits and losses of the enterprise.

Considering them in the most favorable light to plaintiffs, for the sake of this argument, viz.: as partners in the proceeds and the working of the claims, yet we say that they hold these claims as tenants-in-common, and subject to all the incidents of such tenancy.

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Lands acquired by a partnership, for partnership uses, are held by them as tenants-in-common. Collyer on Partnership, § 133, et seq.; Coles v. Coles, 15 Johns. R., 160; Livingston v. Lynch, 4 Johns. Ch. R., 574; Buchan v. Sumner, 2 Barb. Ch. R., 165; Cookson v. Cookson, 8 Simons, 529; Custance v. Bradshaw, 4 Hare, 315; Dyer v. Clark et als., 5 Metcalf, 582.

The cases above cited establish the rule that all real estate of a partnership is held by the partners as tenants-in-common. This rule is adopted as more beneficial and equitable than a joint-tenancy, with its quality of survivorship. As between the partners themselves, it may perhaps be considered as the settled rule that Courts of Equity will regard such real estate as partnership assets, and personal property, for the single purpose of protecting the partners' equitable liens; and this only as between the partners themselves. It has sometimes been viewed in the same light as between the personal representatives and the heir of the deceased partner, but it is doubtful if the weight of authority will go so far.

But, in all cases, the estate of the partners is a tenancy-in-common, and subject to all the incidents of such tenancy, both in law and in equity, except for the purposes above mentioned.

Defendants' instructions, numbered seven and eight, are direct deductions from the doctrine of tenancy-in-common.

Instructions numbered seven and eight, state the principle that one member of a mining company can not fix the boundaries of the claims so as to bind the other members.

If the members are tenants-in-common, these instructions are necessarily correct.

A tenant-in-common cannot prejudice his co-tenant in any matter relating to their common estate. 1 Hilliard on Real Prop., 582.

This follows from the very nature of the tenancy. Each member holds by a title separate from the others. His interest is not confined to any particular portion of the land, but extends to the whole and every part of it. One man can not sell or transfer the title of land which belongs to another. Neither can he, by any admissions, estop another from claiming and holding his own property.

The admissions of one of several parties to a suit are not admitted to affect the others who may happen to be joined with him, unless there is a joint interest between them. 1 Greenleaf's Ev., § 174; Dan v. Brown, 4 Cowen, 492.

The Court will observe that neither of these instructions at all exclude from the jury the evidence in regard to these admissions. We think, indeed, that the evidence was not competent for any purpose, and should have been entirely excluded by the Court. But it was not so excluded. And, whether it was admissible as against the individual members who made the admission, or as

going to show in any way the extent of the claims of the defendants, is not now a question before the Court.

The instructions simply say, that the defendants are not bound by the unauthorized act of Delancy; and that the single member of a mining company cannot settle the boundaries (unauthorized) so as to bind the company.

This language plainly means that such acts and admissions are not conclusive against the company; that they do not create an estoppel as against the other members. They are not bound by such admissions.

2. The principle embodied in instructions numbered four, six, nine, and ten, is this: That if the admissions made by individual members of defendants' company, were made under a mistake in regard to the real facts, then the company are not bound by such admissions.

If the doctrine for which we contend be correct, viz.: that members of a mining company are tenants-in-common of their claims, these last-mentioned instructions are superfluous, and it will not be necessary to consider them. For this Court will perceive that there is no evidence whatever of any admissions, except by individual members of defendants' company. If these admissions are not binding upon the company, it can not matter at all whether they were made under a mistake as to facts or not; for they can not be received as evidence to bind the company in either case.

Admitting, however, for the sake of the argument, that such admissions may bind the company, if made with full knowledge of the facts on the part of those who made them, we still say that they are not binding if made under a mistake with regard to such facts.

"It would be unreasonable to preclude a defendant from showing that the plaintiff had no title, or that he himself had the title to the premises in question, if the acknowledgment of the title of the plaintiff was produced by imposition, or made under a misapprehension of the rights of the respective parties." *Opinion of Judge Nelson in Jackson v. Spear*, 7 Wendell, 401.

It may be urged by the plaintiffs, that the instruction numbered six goes too far, inasmuch as it declares, that if the jury are satisfied that such declarations (of defendants Delancy, Pattenburg, and Robinson,) were made under a mistake as to the real facts, then they must find for defendants."

The Court will observe, however, that the plaintiffs' case rested entirely on the admissions of these defendants. No other evidence of plaintiffs' title was introduced. It is, of course, incumbent upon plaintiffs in an action of ejectment to make out their own title. If the admissions of Delancy, Robinson, and Pattenburg, were not evidence against the company, the jury were

bound to find for defendants; there being no other evidence to support plaintiffs' claim. Hence, the instruction was correct.

No rule is better known than that which requires instructions to be construed with direct reference to the evidence. Now, a glance at this case will show the Court that the whole of plaintiffs' evidence consisted of an attempt to show that Delancy, and other members of the defendants' company, had admitted that the line between themselves and the plaintiffs' claims, passed through the points A and B, instead of the points A and L and M. If it did not pass through A and B, then plaintiffs' case fell to the ground; because they did not offer to prove that it passed through other points.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

This was an action to recover the possession of certain mining-claims. The plaintiffs compose the Star Point Company and the defendants the Michigan Company. The Star Point Company consisted originally of four members, who located the claims in 1854—one for each member of the company, and one by right of discovery—making five claims in all, each fronting one hundred feet, and running back four hundred feet. The Michigan Company located their claims with and adjoining those of plaintiffs, on the next day. For some time after the locations, the miners of that locality considered the front ground only as containing gold; but, subsequently, they became convinced that the heavier deposits would be found under the hill lying back of the first locations. A meeting of the miners of that vicinity was held in August, 1855, at which it was agreed that claims should be extended back to the summit of the hill, in the rear. The controversy in this case regards the line between those two companies. The plaintiffs insist that the line was agreed upon by mutual consent, in 1855; while the defendants insist that such agreement did not bind the Michigan Company, as it was not agreed to by all the members, and that the agreement was founded upon a mistake of facts. In the Court below, the defendants had judgment, and the plaintiffs appealed. The errors assigned go to the giving of a certain instruction, at the request of the defendants, and in refusing the plaintiffs a new trial.

The fourth, sixth, and ninth instructions, embrace substantially the same principle. The ninth is in these words:

"That if the jury believe, from the evidence, that the stake set at the point represented on the map as "B," at the meeting of August, 1855, was placed there under a *mistake* as to the true boundaries and corners, then that the Michigan Company are not bound by such stake or corner."

There was some apparent, though very little of any real contradiction, in the testimony as to the leading facts of the case.

It appears that, at the meeting of the miners of that locality, in August, 1855, it was agreed that the Star Point Company, being the original locators, should first designate their lines, extending their original claims back to the summit of the hill; and that the adjoining companies should afterwards designate their lines. One or more members of other companies went upon the ground, and, by mutual consent, marked a tree, as designating the southern extension line of the Star Point Company. From this point they went north to a point near a large rock, to designate the line between these two companies. The point first selected was not satisfactory to the Michigan Company; but, finally, a stake was set, by mutual consent, at the point marked "B." It seems very clear, from the testimony, that it was supposed by all parties that this stake was in range with the northern line of the Star Point Company's original claims. But in this they were mistaken, as it turned out, upon actual survey, to have been too far north. This line was acquiesced in by both companies, for about two years, and was never disputed by the Michigan Company, until they found, from actual survey, that they had by mistake crossed this dividing line with their tunnel. In the mean time, the present members of the Star Company had, *bona fide*, purchased the shares of the former owners.

It is not necessary to determine whether this mistake, in designating the dividing line, could be corrected as between those who were members of the two companies at the time it was made. The question now arises between *subsequent purchasers*.

The learned counsel for the plaintiffs insist that, conceding the members of both companies, at the time, were mutually mistaken as to the true course of the line between the two companies, the Michigan Company is estopped from disputing that compromise line as against the plaintiffs. If this position of the counsel be correct, the instructions of the Court below were erroneous.

In the late case of *Mitchell v. Reid* we had occasion to examine the doctrine of estoppel. In that case we held that "the particular *intention* with which the declaration was made, is not material, except, perhaps, where the communication is confidential. It is the fact that the declaration has been acted upon by others that constitutes the liability to them."

There was no pretence of fraud on either side, in adjusting the line between the two companies. The intentions of both parties were innocent, and both were mistaken. Since that time other innocent parties have purchased, with a view to this compromise line. It seems that all the three members of the Star Point Company have since sold their shares to the present plaintiffs, and that similar transfers have been made by most of the three members of the Michigan Company; so that the contro-

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versy, on both sides, is substantially between subsequent purchasers, who have all purchased with a view to this line.

Under the circumstances of this case we can not see how the instructions of the Court could be sustained. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. It is but just to say that the learned Judge of the District Court expressed great doubts as to the correctness of some of the instructions given at the request of the defendants, and overruled the motion for a new trial, with the view of having the question decided by this Court.

The twelfth instruction given at the request of defendants seems to have been erroneous. The question was one simply between these two companies, and the compromise line would bind them whether the claims of the plaintiffs would be good or not, as between them and third persons, who were not parties to this suit, and under whom neither the plaintiffs nor defendants claim.

It is unnecessary, and would not be proper for us to decide whether the Court properly refused the application for a new trial upon the ground that the verdict was contrary to the testimony. Under the instructions of the Court, the jury could not well have found otherwise.

Judgment reversed, and cause remanded for further proceedings.

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### UHLFELDER *et al.* v. LEVY *et al.*

One Court cannot restrain by injunction the proceedings of another Court of co-ordinate jurisdiction.

Nor is the rule altered in a case where the suit in equity brings in other parties not included in the action at law sought to be enjoined.

The only exception to the rule is where the Court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought; where several fraudulent judgments are confessed in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court.

So, where the provisions of the Code require the action to be tried in a particular county, there would be an exception, as the positive provision of the statute must be carried out.

It is the business of the plaintiff to show in his complaint that he comes within the exception.

It is a maxim not to be disregarded that general expressions, in every judicial opinion, are to be taken in connection with the case in which those opinions are used.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This was a bill in equity to set aside certain assignments of

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property, and to compel a debtor to apply his property to the payment of plaintiffs' debt, and also for an injunction.

The complaint alleges that Davis Levy and others conspired with Barnard Levy to defraud the creditors of the former; that to accomplish this purpose, Davis Levy assigned a note he held against M. Kime to Bernard Levy; and the latter commenced suit upon the note in the District Court of Placer county, on the seventh of December, 1857; that an attachment was issued from said District Court to the sheriff of Butte county, and by him levied upon the property of Kime; that plaintiffs are creditors of Davis Levy, and commenced their suit against him in the District Court of Yuba county, on the eleventh day of December, 1857; that an attachment was issued to the sheriff of Butte, under which he garnisheed M. Kime and Bernard Levy, on the twenty-first of December, 1857. The bill in this case was filed in the District Court of Yuba, and the plaintiffs seek to restrain Bernard Levy from proceeding with his suit in the District Court of Placer. An injunction having been issued, was, on motion, dissolved, and the plaintiffs appealed from the order to this Court.

*Mesick and Swezy for Appellants.*

The Court erred in dissolving the injunction, on the ground that the action should have been commenced in Placer county, and the injunction granted by that Court. *Heyneman v. Dannenburg*, 6 Cal. R., 377-8-9; 3 Daniels Ch. Ple. and Prac., side pp. 1843, 1845-6-7-8-9, and notes and authorities referred to; 16 Barb. S. C. R., 543; 24 ib., 160; 6 Cal., 21; 6 ib., 452; 12 How. Pr. R., 355; *Jordan v. Williams*, 3 Rand., 501.

Cases referred to in argument—2 Page Ch. R., 26; 5 Sandford Sup'r Ct. R., 612; 1 Clark, 307, 309; *Ricketts et al. v. Johnson et al.*, 8 Cal. R., 34; *Chipman & Aughenbaugh v. Hibbard et al.*, 8 Cal. R., 268; *Phelan et al. v. Peter Smith*, 8 Cal. R., 520; *Anthony v. Dunlap*, 8 Cal. R., 26; *Revalk et al. v. Kramer et al.*, 8 Cal. R., 74.

We are aware that this Court has been holding, in a class of cases, that one Court of co-ordinate jurisdiction can not restrain the proceedings of another Court of the same jurisdiction. *Phelan et al. v. Smith*, 8 Cal., 520; citing the case of *Ricketts and wife v. Johnson, et al.*

We have examined all the cases decided in this Court and find that they were cases where the same parties or their privies were litigating the same or substantially the same subject-matter. The case of *Ricketts et al. v. Johnson*, was a case where the plaintiff in the last action sought to avoid a decree against them in another Court upon the same subject-matter, and between the same parties. So was the case of *Grant v. Quick*, 5 Sand., 612, referred to in the description of that case. The case of *Anthony*

v. Dunlap, 8 Cal., 26, was a case where the plaintiff sought to enjoin the execution of a judgment between the same parties upon the same subject-matter.

The case of Chipman & Aughenbaugh v. Hibbard and Emeric, 8 Cal., 268, was a case between the same parties and in respect to the same subject-matter.

The case of Phelan et al. v. Smith et al., was similar to the others. There the same parties or their privies were seeking to litigate in a State Court the same subject-matter that had become a matter of cognizance in the United States Court. The ruling of this Court in the last case was maintainable on a two-fold ground :

1. On the ground that a State Court could not enjoin the proceedings of a United States Court.

2. On the ground that another Court had the jurisdiction of the same parties and of the same subject-matter.

The last case decided by this Court, (*Gorham v. Toomey*, January Term, 1858,) was a case where the same parties, and their privies, sought to enjoin the proceedings of another Court upon the same subject-matters binding upon the same parties.

The other cases cited by respondents are of the same character, and are simply upon the right of a Court of one State or country to enjoin proceedings in a Court of another State or country.

We do not intend to deny that where one of several Courts of equal jurisdiction, even of the same State, has obtained jurisdiction of the same parties and of the subject-matter in litigation between them, another ought not to interfere.

Daniels, in his *Chancery Pleading and Practice*, vol. 3, side page 1845, says: "Ordinarily, where two Courts have a concurrent jurisdiction over the same thing, whichever Court was first possessed of the cause has a right to proceed with it and it can not be prohibited or restrained by any other." But we do contend that where litigation is not between the same parties before the Court, nor of the same subject-matter, or where parties in one Court are proceeding so as to interfere with the action of another Court, then the parties may be restrained. Any other doctrine would be productive of evil, and lead to mischief.

Daniels says, on the same page quoted from: "Injunctions will also be granted by the Court of Chancery to stay proceedings in other Courts of Justice as well as stay proceedings in Courts of Common Law; and it sometimes grants them where the Court which it enjoins has an original jurisdiction concurrently with itself."

Story, in speaking of the concurrent jurisdiction of Courts of Equity, says: "A learned writer," referring to Eden on Injunctions, "whose work on this subject is in high estimation, has enumerated among the most ordinary objects of the remedial

writ of injunction the following: 'to stay proceedings in Courts at Law, or in Spiritual Courts, the Courts of Admiralty, or in some other Court of Equity.'" Story Eq. Jur., § 872.

Maddox, in his work on Chancery Practice, uses similar language. 1 Maddox Ch. Pr., 106.

From the above language it can not be doubted, that at common law, Courts of Equity had the power to enjoin parties from proceeding in other Courts of Equity of equal or concurrent jurisdiction.

The power to enjoin parties from enforcing the judgment and decrees of co-ordinate and superior jurisdiction, has been frequently exercised, and must still continue to be, when circumstances require it.

The Courts of Kentucky held, in the case of *The Bank of Kentucky v. Hancock's Administrators*, 6 Dana, 284, that a Circuit Court might, by injunction, restrain the enforcement of a mandate of the Court of Appeals, which had been obtained by fraud or surprise. Also, see *Hardin*, 205.

A like opinion was held by the Lord Chancellors (Lord Cranworth and Lord Brougham) in the case of *Shedden v. Patrick*, 28 Eng. Com. Law and Eq., 62.

The District Courts of this State are Courts both of law and equity jurisdiction. They are not restricted by the Constitution in their general original jurisdiction, and consequently take all the jurisdiction in cases in equity known to such Courts at common law. The only restrictions at common law upon Equity Courts of concurrent jurisdiction, were those of a local and politic character; their jurisdiction, in some instances, were restrained to particular districts, and in all cases they were upon principles of public policy subject to be divested of that possession upon its appearing that another Court of equal and co-ordinate powers had previously acquired control of the same parties and of the same subject-matter. But they never hesitated to inquire into the validity of a decree of another Court upon the application of a third person who was likely to be affected thereby, or when such inquiry became necessary or incidental to proceedings pending before such Court.

In the case at bar, the appellants were not parties to the suit in the Placer District Court; they had commenced actions against Davis Levy, and by attachments issued therein, had acquired an equitable lien upon the indebtedness, and had a right to call upon the equity side of the Court, by whose process such lien was created to protect their equity as against the fraud of other parties, whether perpetrated by a fraudulent suit, judgment or otherwise.

In the case of *Anthony v. Dunlap*, 8 Cal., 26, the Court recognized the doctrine that one District Court could enjoin another, and, doubtless, upon the distinction we have named. In that

case, the Court said: "We have before decided that one Court had no power to interfere with the judgment and decrees of another Court of concurrent jurisdiction. The only case in which it [such interference with the judgments and decrees of another Court of concurrent jurisdiction,] will be allowed, is where the Court in which the action or proceeding is pending, is unable, by reason of its jurisdiction, to afford the relief sought."

The case of *Heyneman v. Dannenburg*, 6 Cal., 377, was a case similar to the one at bar. There, Dannenburg had commenced an action in the Twelfth District Court against one Morris, upon a note for ten thousand dollars, and procured an attachment therein, to be issued to the sheriff of Yuba county, under which the property of Morris was attached. Heyneman and others, creditors of Morris, instituted suits for their respective claims against Morris, and in such suits had the same property attached which had been previously seized under Dannenburg's attachment. Discovering that Dannenburg's claim was fictitious, and created for the sole purpose of defrauding the just creditors of Morris, Heyneman and others instituted an action in the Fourth District Court, being their place of residence, against Dannenburg, Morris, and the sheriff of Yuba county, and alleged in their complaint such fraud, and their equitable lien upon Morris' property, and praying therein that the judgment of Dannenburg might be decreed void as to them, and that the proceeds of the property attached be applied to their claims according to their priority. The Fourth District Court granted an injunction, restraining the enforcement of the execution issued upon the Dannenburg judgment, and rendered a judgment making such injunction perpetual. This Court said, in that case:

"Fraud is one of the primary subjects of equity jurisdiction, and it is not to be supposed that a Court of Chancery would refuse to entertain jurisdiction in a case like the present, where the sole issue was one of fraud, and where, by such refusal, the fraud complained of would be most successfully consummated."

It will be necessary to refer to the record in the above case, in order to find the facts as we have stated them—the published report of the case is meager in some respects.

The distinction we have contended for is fully sustained by the decisions of the States of Texas and Kentucky, where the same Courts have jurisdiction in both law and equity.

In the case of *Winnie v. Grayson*, 3 Texas R., 429, an injunction was granted to restrain an execution issued upon a judgment of another Court.

In the case of *Kitchen v. Crawford*, 13 Texas Rep., 516, the Court held that one District Judge could, from his general powers under the Constitution, grant an injunction to restrain an execution issuing from and returnable to another district, notwithstanding the law required that such injunction-bill should be tried

in such other district. The same general powers possessed by the District Courts of Texas, in this respect, are conferred upon our Courts by § 6 of Art. VI of the State Constitution, and Art. 644 of Wood's Digest, p. 150.

The Court, in the State of Kentucky, where the Circuit Judges are Judges both at law and equity, have held the same doctrine laid down in Texas.

In *Mason v. Chambers*, 4 J. J. Marshall, 402 and 406, the Court declared the unqualified power in a Court of co-ordinate jurisdiction, unless denied by statute restriction, to enjoin the enforcement of a judgment of another Court of equal powers.

The principles laid down in this case are sound law, and tally with all of our notions of equity jurisdiction or equity practice. It probably is not applicable to the practice of New York, where they hold, that between the same parties, all defences, of both law and equity, must be made to the action at law, and that equitable defences can not be presented in a separate action, even in the same Court. The Courts of that State hold :

"That the defendant, who has an equitable defence to an action, being now authorized to interpose it by answer, is bound so to do, and shall not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same Court." *Winfield v. Bacon*, 24 Barbour's Rep., 160; *Foot v. Sprague*, 12 Howard Prac. Rep., 355.

But, in this State, a different rule prevails. In *Lorraine v. Long*, 6 Cal., 453, the Court says : "Although a party may set up all equitable defences to an action at law, his remedy is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief."

In Kentucky, where the law says the defendant "may set forth in his answer as many grounds of defence and counter-claims, whether legal or equitable, as he shall have," the Courts have held, "there is nothing, however, contained in the Code which precludes him, if he fails to avail himself of this privilege, and permits a judgment to go against him, from bringing an equitable action to obtain relief against the judgment." *Dorsay v. Reese*, 14 B. Monroe Rep., 157.

In this State, the Code of Procedure does not use the word equitable as does the Kentucky Code. The language of our Code is : "The defendant may set forth as many defences and counter-claims as he may have." Wood's Digest, Art. 783, p. 173.

If, then, in the State of Kentucky, the Courts hold that a judgment at law in one county can be enjoined in an equitable action between the same parties, brought in another county or district, except when prohibited by positive statute, we can see no reason against the adoption of the same rule in this State, since we have no law directory on this subject.

If the judgment-debtor was required, as in New York, to set

up all his equitable defences to the action at law, then there would be some plausibility in the doctrine as held in New York by Judge Duer.

*Reardon, Mitchell, and Smith*, for Respondents.

To the second point made by appellants, we answer, that the ruling of the Court was proper, and that the injunction was rightfully dissolved, because the complaint showed that Bernard Levy, one of the defendants, had commenced an action in the District Court of Placer county, in the Eleventh District, against M. Kime, also one of the defendants in this action, upon a promissory note for \$2,600, executed by Kime to Davis Levy, and by him transferred to Bernard Levy; had issued an attachment to the sheriff of Butte county, who, thereunder, had attached the property of Kime; that the object and necessary effect of the injunction was to restrain the defendant Bernard Levy, from prosecuting his suit in the District Court of Placer county, and to prevent the sheriff of Butte county from executing any process of the said Court that might be issued in the action.

The plaintiff having shown these facts, by his complaint, the Court correctly held that the injunction was improperly issued from the District Court of Yuba; that the plaintiff's seeking to annul and avoid the judgment and process of the District Court of Placer county, should have applied to that Court for relief.

This case is precisely in point with *Rickett and Wife v. Johnson et al.*, 8 Cal., 34; *Chipman et al v. Hibbard*, 8 Cal., 268; *Phe-lan et al. v. Peter Smith et al.*, 8 Cal., 520; and, also, with *Grant v. Quick*, 5 Sandford, 613.

We have carefully examined the authorities cited by counsel for the appellants, but have not been able to discover that a single one bears upon the question at issue, except such as are directly in point against the position they assume.

In *Heyneman v. Dannenburg* 6 Cal., 377, the point did not arise, was not discussed, or considered. In 3 *Daniel Ch. Plead. and Practice*, the points relied upon by appellants' counsel, are not applicable to this case, except note two, on side page 1847, at the bottom of the note, which makes for the respondents.

The cases in 16 Barb., 543; 24 Barb., 160; 6 Cal., 21 and 452; 12 Howard Prac. R., 355; and 3 Rand, 501, referred to by counsel for appellants, we suppose have been inserted in their brief by mistake, inasmuch as we can not see that they relate, in any manner, to the question now before the Court.

Relying upon the decisions of this Court before referred to, and also upon *Grant v. Quick*, 5 Sandford; 2 *Story's Equity Jur.*, § 900; *Mead v. Merritt*, 2 Paige, 402; *Bicknell v. Field*, 8 Paige, pp. 440-5; *Mitchell v. Bunch*, 2 Paige, 606; *Wilson v. Robertson*, 1 Tenn., 266; we confidently submit that the order of the Court below, dissolving the injunction, was properly made.

The rule, as declared in the decisions we have cited, is now too well settled, and the reason of the rule too apparent, to require from us any argument in its support.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The rule established by repeated decisions of this Court is not controverted by the learned counsel of plaintiffs. But they insist that this case is clearly distinguishable from the cases of *Ricketts and Wife v. Johnson* and others, 8 Cal. R., 34, and *Anthony v. Dunlap*, 8 Cal. R., 26. It is contended that as those cases are between the *same* persons who were parties to the former suit, those decisions can not apply to this case, in which *new* parties are brought in, who could not have set up the same matters in the suit between Bernard Levy and Kime, because these plaintiffs could not intervene in this case.

But we conceive that this circumstance can make no difference in the application of the true principle on which the decisions, in those cases, were predicated. Those decisions are not based upon the personal rights of parties, which, of course, they can waive, but upon the rights of Courts of co-ordinate jurisdiction. The *power* of one District Court to restrain proceedings in another, in cases where as *adequate* relief can be *as well* had in the Court in which the proceedings are pending, is denied by the former decisions of this Court. If, therefore, a bill was filed in the District Court of Sacramento, to restrain proceedings in the District Court of Yuba, in a case where the latter Court could as well give the relief sought, the former Court, of its own motion, should dismiss the bill.

In the case of *Ricketts and Wife v. Johnson* and others, we said:

“In the present case, the plaintiffs could obtain the most ample relief in the Court whose proceedings they wished to restrain; and there was no reason for seeking another tribunal possessing only the same powers.”

So, in the case of *Anthony v. Dunlap*:

“The only case in which it will be allowed is where the Court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought.”

In the opinion of Judge Duer, (5 Sand., 612,) the true reason of the rule is given. This decision in *Sandford* is referred to and confirmed in 24 *Barbour*, 160.

It is true that there may be exceptions to the *general* rule, that one District Court cannot restrain the proceedings of another. A case not coming within the reason of the rule, would not come within the rule itself. The reason of the old rule having ceased, the rule ceased; and the new rule came into existence because of the existence of the new reason. Where

the new reason does not exist to sustain the new rule, the new rule, by the very nature of its terms, must also cease. The same fraudulent debtor might confess different fraudulent judgments in different judicial districts. It would not then be necessary for the creditors to bring a different suit in each different Court. So, too, in cases where the provisions of the Code require the action to be tried in a particular county, there would be an exception. Of course, a positive provision of the statute, requiring the suit to be brought in a particular county, must be carried out.

There would seem to be no serious difficulty in practically applying the rule. It is true that the language of the former opinions of this Court is broad and general. But this language must be construed with reference to the reason and facts of the cases.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those opinions are used." (Ch. J. Marshall, in 6 Whea., 399; see, also, 15 Mo. Rep., 433.)

It is insisted by the counsel of plaintiff, that there is nothing in the bill to show that any of the parties reside in Placer county, and that it can not, therefore, be pretended that the action could be tried there. But to this, it may well be replied, that there is nothing to show affirmatively that plaintiffs could not as readily obtain all the relief sought, had they brought this suit in the Court whose proceedings they wished to restrain. It was the business of the plaintiffs to show, upon the face of their bill, that they were entitled to proceed in the District Court of Yuba, to restrain the proceedings of the District Court of Placer. The circumstances, if any, giving this right, should have been by them affirmatively alleged.

We can see no sufficient reason for this proceeding, and think the Court below was right in dissolving the injunction. It is clear, that as full, ample, and speedy relief could have been had in Placer, as in Yuba. We know of no former decisions of this Court in conflict with the view we have taken. The decision of this Court in the case of English and Hooper v. Subock, (4 Cal. R., 31,) referred to by the counsel in the case of Toombs v. Gorham, is not opposed to the view we have taken, but is an authority to support it. In that case, the Court in which the *first* suit was brought, issued an injunction restraining the defendant from proceeding at law. After the issue and service of the injunction, the defendant in the first suit proceeded to sue in a different Court, of co-ordinate jurisdiction. The Court in which the second suit was brought disregarded the injunction issued in the first, and this was held by this Court to be error. The same principle sustains the decision in the case of Ricketts and Wife v. Johnson, and of Anthony v. Dunlap.

Judgment affirmed.

GRAY v. PALMER AND EATON, ADMINISTRATORS, *et als.*—EATON v. PALMER, ADMINISTRATOR, *et als.*

- A decree adjudging that a partnership existed between two of the parties to the action, and that another partnership existed between one of them and another party to the action, each partnership embracing all business and property, both real and personal, of the parties, and deciding that the one partnership is subject to the other, and directing an account to be taken, there being other parties to the action representing the interest of one of the partners in each partnership, is interlocutory, and not final. Such a decree does not ascertain the specific sum due to any of the partners, nor direct the disposition of the partnership property. It does not settle the *present* condition of the partners, but only the original terms of their partnership.
- In the "Act to regulate the settlement of the estates of deceased persons," the words *claimant* and *claim* are used as synonymous with the words *creditor* and *legal demand*. It was not the scope and purpose of this action to establish claims against the estate, to be paid out in due course of administration.
- A surviving partner being entitled to the possession and control of the partnership effects, can proceed directly in the District Court to obtain the control, and to have a partition of the real estate belonging to the partnership, but standing in the name of his deceased partner.
- It was necessary to file this bill, and make the administrator, the widow, and the infant, parties, to rebut the presumption of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of the deceased, and the administrator had possession of the personal property. These objects could only be accomplished by proceedings in the District Court, as the Probate Court did not possess the judicial means of giving relief.
- Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons, or notice, in said paper, is sufficient, and it is unnecessary for the affidavit to describe him as *principal clerk*.
- The requirement of the statute being positive that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this State and his residence is known to plaintiff, such residence should be stated in the affidavit for publication.
- The failure to deposit in the post-office a copy of the complaint and summons, directed to such minor, is not cured by the appearance of the mother in her own behalf.
- The Court has no right to appoint a guardian *ad litem* until the infant is properly brought into Court.
- A partnership may exist in the purchase and sale of lands, but such a partnership can only exist where the contract is reduced to writing. It is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the partners are afterwards mingled; but they must be jointly concerned in the future sale.
- It does not matter in whose name the real estate is held; he is only a trustee for the partnership; and for the purpose of disposal and distribution, it is to be treated as personal estate.
- This being the true character of partnership real estate, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance due him.
- There may be a dormant partnership in the purchase and sale of real estate as between the partners themselves, but as between the partners and third persons, the law in regard to dormant partners will not apply.
- Parties may form a universal partnership, but the same would not be held to exist, unless the intention was clearly expressed. The evidence to establish such a partnership, after the death of one of the alleged partners, should be clear and full, and not subject to doubt.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

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Gray v. Palmer.

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A motion was made on the part of counsel for respondent Gray, to dismiss this appeal, on the ground that the appeal was not taken in time. The first decree was entered some time in the year 1855, probably in October, but it is not certain, as there is no date to the decree. The actions were consolidated October 24, 1855, and the decree seems to have followed directly after the order of consolidation. The second decree was made on the twenty-first day of November, 1856. The notice of appeal was filed in the Court below, October 7, 1857.

[As this Court has disposed of the motion, and the case, in one opinion, no separation of the briefs of counsel, on this motion, is deemed necessary.—REPORTER.]

This was a suit in equity, (consisting of two separate actions, here consolidated in one,) for the dissolution of a copartnership, partition of the partnership property, and an adjustment and payment of the debts of the concern.

The facts are as follows :

On the fifteenth of July, 1853, Franklin C. Gray died in the State of New York, leaving there a wife, Matilda C. Gray, and a posthumous child, Franklina C. Gray. This wife and child are the appellants here.

He also left in California real and personal property, appraised, in the Probate Court of San Francisco, at over two hundred and thirty-seven thousand dollars.

On the eighteenth of February, 1854, William H. Gray, a brother of the decedent, residing in San Francisco, commenced the first of the above actions against the estate. His bill alleges the existence for some years, of a partnership between himself and the decedent, the death of the latter, and the appointment of Joseph C. Palmer and Cornelius J. Eaton, as administrators.

The allegations of the bill respecting the partnership, are as follows :

“That about that period the said Franklin, on account of some domestic troubles, was desirous to go off upon a long journey, and as the plaintiff had before then been for some months in the Mexican republic, the said Franklin proposed that they should go upon a trading expedition on their joint account, to Santa Fe and Chihuahua, in New Mexico, and then through Mexico generally; one of the inducements to said enterprise being that the plaintiff was familiar with the language, manners, and customs, of the Mexican people. After some negotiation the agreement was made as proposed, and the understanding was, that they were to set out early in the ensuing spring. In the meantime, the said Franklin having business at Washington, went there to adjust it, and whilst there the rumors of discovery of gold in California were confirmed; whereupon the said

Franklin at once wrote to the plaintiff, that California was the proper field for their intended operations, and that he would at once embark from New York for Chagres and that the plaintiff must make arrangements to meet him either at that point, or, if possible, at Havana. On the receipt of the letter the plaintiff at once proceeded to wind up his business at St. Louis, and in January, 1849, arrived at New Orleans on his way to California *via* Panama. But on his arrival at New Orleans, hearing that there was little or no prospect of obtaining transportation from Panama, on account of the crowd of passengers then assembled there, he retraced his steps to St. Louis, and in the Spring of 1849, set out across the plains of California, arriving here in October of that year. On his arrival he met said Franklin, who had then been here about four months, which time he had employed profitably, and during that period had earned and realized a considerable sum of money. He gave the plaintiff a full account of his operations, and distinctly stated that, regarding their previous arrangement as in full force, he (the plaintiff) was justly and fairly entitled to one-half of all that he (Franklin) had acquired in California, up to that time, and that thenceforth all their operations in California would be upon joint account; and that all profits and losses in their business should be equally divided between them.

“But the plaintiff proposed that inasmuch as the said Franklin had already accumulated a handsome capital without his (the plaintiff's aid, he (plaintiff) would be content with one-third instead of one-half interest in the fund already on hand, and their future acquisitions. To this, said Franklin at once distinctly assented, and immediately drew up, executed, and delivered to the plaintiff, a written stipulation to that effect, setting forth explicitly that the plaintiff was entitled to one-third of all the acquisitions of the said Franklin, in California, up to that period, and that in all their subsequent business transactions in this State, of whatsoever nature, they were to be jointly interested—the plaintiff to the extent of one-third, and the said Franklin two-thirds. It was then agreed that they were to open a commercial house in San Francisco under the firm and style of F. C. Gray & Co., which should be chiefly under the control and management of the plaintiff, whilst the said Franklin would devote himself to other pursuits for their joint benefit. The commercial house was accordingly opened, and continued to be conducted by the plaintiff until a recent period, he having put into the concern of his own money about nine hundred dollars in addition to that furnished by said Franklin. They proceeded in business prosperously, and by their joint efforts and industry increased their capital and means rapidly, the management and control of which was entrusted almost exclusively to the said Franklin, in whom the plaintiff had the most implicit confidence.

They embarked extensively in real estate operations and in other business enterprises which were conducted exclusively in the name of said Franklin, notwithstanding the plaintiff was interested to the extent of one-third in the whole of them, as hereinbefore set forth.

“In this manner the said Franklin bought and sold real estate, taking the titles in his own name, though for their joint benefit, and engaged in other lucrative enterprises, from which large profits were realized, and which were conducted in the sole name of said Franklin, though, with their joint capital, and for their joint advantage, and on their joint account. By these means, they succeeded in accumulating a large estate, consisting of houses and lots in the city of San Francisco, lands in other portions of the State of California, debts, and moneyed demands due them, and a large sum in ready cash: to one-third of all of which, the plaintiff was and is justly entitled, by virtue of the partnership agreement aforesaid.”

The bill also set out the destruction of the articles of copartnership by fire.

He annexes to his complaint a schedule of the estate, and asks “that one-third of the same be adjudged and decreed to belong to him, under said partnership agreement, and that partition thereof be made, between himself and the defendants.”

Publication was made of the summons, and the order of Court directed a copy of the summons and complaint to be deposited in the post-office, directed to the infant daughter, and to the care of the mother. Upon the petition of the plaintiff, a guardian *ad litem* was appointed for the child. This guardian also appeared as attorney for the widow, and filed answers for each, admitting the appointment of the administrators, but denying the other allegations of the complaint.

On the fifth of January, 1855, the cause came on, and special issues were sent to a jury for trial. Eleven jurors were empaneled, who found a verdict for the plaintiff upon each issue.

In February, a motion was made for a new trial, which was denied; subsequently, an appeal was taken from the denial of this motion, which was dismissed, because the Chancellor was not bound to enter a decree in accordance with the verdict, and no decree had been made, from which to appeal.

No further steps were taken in this action until October 23, 1855; meanwhile, Cornelius J. Eaton, the former clerk of the decedent, and, as one of the administrators, a defendant in the above action, in April, 1855, commenced the second action against the estate.

His complaint and proceedings were, substantially, the same as those of Gray, in the first action. He differs from him, in claiming, as partner, one-fourth, instead of one-third, of the estate.

The instrument under which he claims to be a partner is set forth in the complaint, and is as follows :

" This indenture, made and entered into this first day of January, A. D. 1851, by and between Franklin C. Gray, party of the first part, and Cornelius J. Eaton, party of the second part, both of the city of San Francisco, State of California, witnesseth : That the said party of the first part, for and in consideration of the following conditions, and for the further consideration of the sum of one dollar to him in hand paid, by the said party of the second part, the receipt whereof is duly acknowledged, hath this day granted, bargained, sold and delivered to the said party of the second part, the undivided one-fourth right and interest in, and to, all the property, both real and personal, of which the said party of the first part, is now possessed, or may hereafter be, within the time for which this instrument is executed. The conditions are as follows, to wit :

" 1. The said Eaton agrees and binds himself to remain with the said Gray for the term of two years from the first day of January, A. D. 1851, at which time a division of all property, real and personal, shall take place, unless both parties should wish to remain longer together; that is to say, one-fourth to the said Eaton, and the remaining three-fourths to the said Gray.

" 2. The said Eaton shall unite all the funds he may become possessed of, in the joint fund, for the purpose of accumulation.

" 3. All outstanding debts shall be paid out of the joint fund, held against the said party of the first part.

" 4. Both parties to this instrument shall have the privilege of visiting the States, and all the expenses incurred shall be charged to the party so making them, and settled at the expiration of said term.

" 5. Should the connection be dissolved by the death of either of the parties, the affairs shall be closed in the following manner: If dissolved by the death of the said Eaton, his heirs shall receive from the said Gray the sum of one thousand dollars per month for his services, from the first day of January, A. D. 1851, until the time of his decease; and if by the death of the said Gray, the said Eaton shall, for settling up the estate of the said Gray, receive the full amount of this contract, as fully as if the time had been completed.

" In witness whereof the said party of the first part has hereunto set his hand and seal, on the sixth day of September, A. D. 1851.

F. C. GRAY. [SEAL.]

"Attest : JAS. C. L. WADSWORTH."

Neither the complaint of Gray, nor of Eaton, contains any allegation that the claim made therein to a portion of the estate was presented to the administrator before suit was brought.

An order of publication was made in this case, but the order did not direct a copy of complaint and summons to be deposited in the post-office, directed to the non-resident defendants.

When the time requisite for publishing the summons of Eaton had expired, and on the twenty-third of October, 1855, all the parties to both actions, by their respective attorneys, signed a stipulation to consolidate these two actions into the one now before the Court; and four days afterwards a joint decree was entered in the consolidated action.

This decree decided that a dormant partnership existed between William H. Gray and the deceased; and that another one, separate and distinct, co-existed between Cornelius J. Eaton and the deceased; that Eaton should take one-fourth of the estate, and Gray one-third of the remaining three-fourths, (that is to say, another one-fourth,) leaving the remaining two-fourths to be divided between the widow and child. The decree also ordered a reference to take the partnership accounts; a sale of the entire estate, and a division of the proceeds.

Under this decree a sale was made of the estate. On the twenty-fourth of November, 1856, the final decree was entered, confirming the sale of the real and personal property, and rendering the above-mentioned judgment in favor of William H. Gray.

A decree was subsequently made to pay the debts. From this final decree, and all interlocutory orders and decrees, the widow and child, by another attorney and another guardian *ad litem*, appeal to this Court.

*Philip G. Galpin* for Appellants.

That this appeal is not too late, will appear:

1. From the decisions under the former chancery practice.
2. From the provisions of the Practice Act.

It is contended that the decree of October 27, 1855, was not an interlocutory, but final decree, from which it is now too late to appeal.

Five authorities are cited upon this point, which are wholly inapplicable, for two reasons:

1. In all of those cases the appeal had been taken from an order or decree, which settled the merits of the case, leaving only ministerial acts to be performed by the clerk. As all the questions to be decided on the appeal grew out of such order or decree, and the proceedings prior thereto, they could well be determined by the Court upon the appeal. For the purpose of upholding the appeal, and thereby saving a second one, which would, in fact, be useless, as it could not review such ministerial act, the Appellate Court properly held such decrees final. But this is by no means decided, that if a decree settles the principles of a case, and refers it to a Master, to take an account and report, and when a party, instead of appealing from such order or

decree, chooses to wait until the amount of indebtedness has been fixed, and a proper final judgment for that amount entered, and when he then appeals from such final judgment, that his appeal ought to be dismissed.

In fact, that a party has the right to adopt the latter course is expressly decided in the *Steamboat New England*, 3 Sumner, 495.

Now, if the Court would not dismiss the appeal from the final decree, when not too late to appeal from the interlocutory one, how much less would they do so, if, as in the present case, it is too late to appeal from such interlocutory decree?

We have a precisely parallel case in *Cooke v. Gilpin*, 1 Rob., (Va.) 20: "In a suit by a partner against his copartner, for a settlement of the partnership accounts, and for a moiety of a tract of land purchased with partnership funds, and conveyed to the defendant alone, a decree was pronounced declaring the land partnership property, and directing an account.

Upon a hearing, upon the commissioner's report coming in, the Court decided the balance found due the plaintiff, by the report, to be paid by the defendant, and that the plaintiff should convey a moiety of the land to the defendant, on payment of such balance, but, in default of such payment, directed such moiety to be sold, and out of the proceeds, after paying expenses, to pay such balance to the plaintiff: the decree also directed the outstanding debt to be equally divided between the parties.

Held, that this decree was interlocutory, and not final, and that on appeal from a subsequent final decree, it could be revised by the Appellate Court, although the lapse of time before taking the appeal would have precluded its reviewal, had it been a final decree.

2. None of the cases are in point, because, in all of them, the acts to be performed subsequent to the decree were purely ministerial, while, in the present case, the decree devolved upon the master the judicial duty of deciding upon the legality and admissibility of the items of account presented.

It is said by Justice Sutherland, in *Kane v. Whittick*, 8 Wendell B., 226, that "no case can be found in which a decree directing a reference to a Master, has been held a final decree."

It is said that an account was ordered to be taken in *Weatherford v. James*, 2 Ala., but a careful examination of the case will show that the clerk was ordered merely to compute the value of the estate of a tenant by courtesy, in a fee valued at eight hundred dollars. This was purely a ministerial act.

In *Travis v. Waters*, 12 Johnson, 500, the decree from which the appeal was taken was entered upon the report of the master after the account had been taken; nay more, it was upon this very ground that that decree was held final. This decision is,

then, directly in our favor. See *Travis v. Waters*, 17 John., 508-9.

The case in 3 Cranch, 179, and 13 Peters, 6, are distinguished from this case by the decision in the *Palmyra*, 10 Wheaton, 502, and *Chace v. Vasques*, 11 Wheaton, 429.

The balance found due by the master in this case, and for which a decree might be entered, was exactly like the amount of damages in those cases for which a decree might have been entered.

The case in 1 Monroe is also reviewed in *Hax v. May's heirs*, 1 J. J. Marsh, 497.

Any decree directing a reference to a master to take an account, and ordering him to report to the Court, is not a final but an interlocutory decree. 2 Atk., 385; *Kane v. Whittick*, 8 Wend., 219; *Jaques v. Meth. Epis. Ch.*, 17 Johnson, 558; *Cocke v. Gilpin*, 1 Rob. Va., 20; *Goodwin v. Miller*, 2 Mun., 42; *Templeman v. Steploe*, 1 Mun., 339; *Mackey v. Bell*, 2 Mun., 523; *Creiger v. Douglass*, 2 Coms., 571; *Perkins v. Fourniquet*, 6 How. U. S., 206.

1. That because these respondents, being holders of claims against an estate, have neither of them alleged nor proved the presentation, to the administrator, of their respective claims, before suit was brought; they have not placed upon the record, nor proved upon the trial, sufficient facts to constitute a cause of action.

The words of the statute are, "no holder of any claim against an estate shall maintain any action thereon, until the claim shall have been first presented to the executor or administrator." Rev. Laws of Cal., 396, § 136.

2. Are the respondents "holders of claims?"

It is a truism which requires no demonstration, and receives no additional strength from the sanction of judicial decision, that the meaning of a statute is the meaning of its component words. *Newell v. The People*, 3 Seld. Rep., 97, subsequently approved in *McCluskey v. Cromwell*, 1 Kernan Rep., 602.

To ascertain whether the respondents are "holders of claims," it is only necessary to investigate the meaning of the word "claim."

Says Ch. J. Nelson, in 2 Hill, N. Y. Rep., 223, "the word claim is of much broader import than the word debt, and embraces rights of action belonging to the debtor, beyond those which may appropriately be called debts."

How broad the import of the word is, may be seen from the following authorities:

"The word claim (Latin clamor) signifies a call, a demand, and implies a right, or supposed right, in the claimant, to something in another's possession, or power. It may be made by words, by suit, or other means." Webster's Dic.

Burrill, and Bouvier, relying upon Plowden, and Sherp-

herd's Touchstone, define a claim to be, "a challenge, by any man, of the property or ownership of a thing which he has not in possession, but which is withholden from him unlawfully."

Justice Story, in the 16th Peters R., 539, 615, says: "a claim is a demand of some matter, as of right, made by one person upon another, to do, or forbear, some act, or thing, as a matter of duty."

Justice Tilghman, in the 9th Serg. & Rawle Rep., 124, says: "the word demand is very comprehensive, and includes everything a creditor would have a right to recover by suit;" but, says Lord Coke, "the word demand is the largest word known to the law, save only claim, and a release of all demands discharges all rights of action." Co. Litt., 291; Litt., § 508; 8 Co., 553; Bac. Ab., Tit. Release, 283; 1 Denio, 277, 261; Ellissen v. Halleck, 6 Cal. R., 386; McCann v. Sierra Co., 7 Cal. R., 281.

Having shown, from all authority, that the word claim embodies a definite meaning, which includes every right of action, we will now demonstrate that the plaintiffs' hypothesis, "that the rights of action sought to be enforced in these suits, are not claims," involves an absurdity.

The Court never had jurisdiction over the person of Franklina C. Gray.

In a note to the third edition of the New York Code, 127, § 135, it is said, "It is the uniform and unbroken course of decision, that under all statutes which authorize the substitution of some other means, for personal service of process, as a foundation for the jurisdiction of the Court, the most exact compliance with those requisitions will be enforced. Unless such compliance be shown affirmatively, the proceedings will not be sustained." 3 Sme. & M., 645.

See, also, Voorhies Code, 128, § 135, various cases, in which the affidavit of service was held defective.

In the case of Gray v. Eaton, the service was by publication, and the plaintiff was ordered to deposit a copy of the summons and complaint in the post-office, addressed to the infant. The object of the provision of the Practice Act, under which this was done, was to compel the plaintiff to give, in good faith, the best notice he could to the defendant, of the commencement of the action.

The affidavit of publication was not made by the principal clerk, the printer, or foreman. Pr. Act, § 33.

In Eaton v. Palmer, the order for publication does not appear to have been either signed, filed, or entered, and contains no direction to deposit a copy of the summons and complaint in the post-office, etc. The affidavit on which it is obtained shows that the infant resided in the State of New York. It should either state where, in the State, it resided, or that the deponent did not know.

Again, the affidavit of publication was made by a book-keeper. Nor is the appearance of the infant, by a guardian *ad litem*, appointed upon the petition of the plaintiffs, any waiver of a regular service.

In fact, such a guardian can not be appointed until service has been made. Pr. Act, § 10.

3. The complaints do not allege the existence of such a partnership as entitle the plaintiffs to file a bill in equity, as partners; but even if Gray may do so, Eaton can not; nor can the latter, in any event, recover upon his complaint.

In the case of *Gray v. Eaton et al.*, the complaint shows the existence of two distinct branches of business—the one, a commercial house, conducted in the name of F. C. Gray & Co.; the other, the real estate business and financial speculations of F. C. Gray conducted by him in his own name.

The plaintiff claims, not as a partner in the commercial house of F. C. Gray & Co., but as a general partner in and joint proprietor of all the business, and all the speculations, and, consequently, of all the acquisitions of his brother. The claim of Eaton is the same.

Now, *first*, it is essential to a partnership that it should have for its subject-matter some business, trade, or adventure.

It appears to be claimed, by each plaintiff here, that this was not a general partnership, which extends to the gains, earnings, and profits, of some business, but it was a universal partnership, in which the parties share, not only the profits, but the capital itself; and of these partnerships, it is said, in *U. S. Bank v. Binney*, 5 Mason R., pp. 176, 183, "there is probably no such thing as a universal partnership, if by the terms we are to understand everything done, bought, or sold, to be deemed on partnership account."

We say that the common law has never as yet recognized a universal partnership. The mere agreement of two parties to put all their worldly effects together, and to divide, in certain proportions, the income or the profits, may make them tenants-in-common; and perhaps would give them, as such, the right to an accounting, and to a partition, but it would not make them partners. 3 Kent Com., 25. Neither of them would have the powers and privileges of partners over the undivided whole; neither of them could bind the other by note or otherwise. He could only affect by his acts the joint property to the extent of his own interest, no more. Such a partnership may be recognized in the laws of France and Spain, but it is yet unknown to the law merchant of England. 3 Kent, § 30.

*Second*—In this trade, business, or adventure, which forms the subject-matter of the partnership, there must be some mutuality. *Dwivel v. Stone*, 30 Maine, 386; *Collyer on Partnerships*, p. 113 § 123.

The profits must be accumulated by joint capital, or labor, or both.

If a carpenter and a tailor agree, between themselves, that they will each continue, as theretofore, to carry on his own business, without the assistance of either capital or labor from the other, but that they will put their profits into a common stock, and divide them—this, of itself, does not constitute a legal partnership. A note given by either would not bind the other, nor would the property of either be liable for the debts of the other; they have not the powers of partners over each other, and the law does not recognize them as such. *Chase v. Barret*, 4 Paige Ch. R., 159; 15 Johns., 422; 21 Black., 244.

*Third*—It is said, in *Muchell v. Dahl*, 2 Har. & Gill, 159, and *Kelley v. Hurlburt*, 5 Cow., 534, that every person is a dormant partner who is not mentioned in the firm, or embraced under the general terms, in the name of the firm or company. Now, in the present case, there is an allegation that the business of purchasing and selling real estate, was carried on in the name of F. C. Gray.

Each complaint then sets forth the existence of a dormant partnership, in the purchase and sale of real estate, but such a partnership has never been recognized, as yet. Story on Part., § 88.

Thus, for example, the ordinary doctrine of the liability of dormant partners does not extend to partnerships formed for speculations in the purchase and sale of lands, citing *Pitt v. Waugh*, 4 Mass., 424; *Smith v. Burnham*, 3 Sumner, pp. 435, 470.

It seems that even as third parties, there can be no such thing as a dormant partnership in the purchase and sale of real estate; and if not, how much less can such a partnership be held to subsist as between the parties themselves; they may be tenants-in-common of the realty, but as commercial partners, seeking an accounting, they can have no standing in Court.

But even if the complaint of W. H. Gray alleges the existence of a legal partnership, it is certain that that of Eaton does not.

This complaint sets out the existence of a paper, which is alleged to constitute a contract of partnership. This paper is annexed to, and made a part of, the complaint.

We here lay out of the case all questions as to whether Eaton has rights, as a tenant-in-common, of the property, or not, but we say he has no rights as a partner, for four reasons:

*First*—Because, as we have attempted to show heretofore, the law will not, as between the partners, recognize or enforce, as a legal partnership, an agreement to share all of any person's property, and its accumulations. There must be a union of capital and labor, for the purpose of carrying on a legal trade, business, or adventure.

*Second*—But in any event, this was not an agreement for a

partnership, but simply a conditional sale to Eaton, of one-fourth of the property, at the time owned by Gray, together with its accumulations. *Chase v. Barret*, 4 Paige Ch., 159.

*Third*—The consideration for this conditional sale was the services agreed to be performed by Eaton, during the existence of the contract, (for which time "he was to remain with the said Gray,") and, also, his services after the death of Gray, in "settling up the estate of the said Gray," for which he was "to receive the full amount of his contract, as fully as if the time (of two years) had been completed."

But the first portion of the fifth condition clearly shows that this agreement was not for a partnership, but for a remuneration for the services of Eaton.

The fifth section says—not, "if this partnership," but, "if this connection be dissolved by the death of Eaton, his heirs shall receive from the said Gray, the sum of one thousand dollars per month for his services, from the first day of January, 1851, until the time of his decease."

Now, even if Eaton was to receive a portion of the profits of the accumulations, he was not, for that reason, of necessity a partner.

If he received it as a compensation for remaining with Gray, and for settling his estate after his death, he was not a partner, even as to third persons, much less as between the parties. 3 Kent Com., 33; 1 Smith Lg. Cases, 332; Collyer on Part., 23; *Muzzy v. Whitney*, 10 John. R., 228.

Eaton can only be held a partner as to third persons, on the ground that, having taken from the creditors a portion of the profits, he ought to be held responsible, also, for his proportion of the loss; but as between the parties this reasoning does not apply. *Waugh v. Carver*, 2 H. Bl., 235.

*Fourth*—The contract was inequitable, and ought not to be enforced against holders of the legal title, at least until Eaton, by showing that he has put some capital or labor into the concern, discloses an equity superior to theirs. *Chamberlain v. Thompson*, 10 Conn., 343.

4. The decree was contrary to the weight of evidence.

Under the decisions in *Pitt v. Waugh*, 4 Mass., 424, the whole evidence in this case is inadmissible, because the law merchant, relative to dormant partners, does not extend to speculations in land. *Story on Part.*, § 83.

5. The decree was erroneous, because it was entered against an infant by consent, and no day in Court is given her, after she comes of age, to show error in the decree.

We have previously seen that the guardian *ad litem*, for the child, in each case, was appointed upon the petition of the plaintiff.

This guardian, appointed to protect the interests of the child,

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consents to the entry of a decree against her. It may well be questioned whether a guardian, appointed by the Court, on the petition of the plaintiffs, has any right or power to give such a consent, and whether a decree entered upon it, ought not to be reversed; but in the present case, not only is the decree entered by consent, but it even deprives the infant of her inheritance, without giving her a day in Court.

This is not simply a partition-suit, to divide property admitted to belong to an infant, jointly with others, but a suit, first, to establish a title adverse to that of the infant; then, under pretext of a partition, to procure a sale of the entire property. There can be no question but that, if the plaintiffs elect to sell this estate, not in the Probate Court, under the provisions of the statute, but under the decree of the District Court, acting as a Court of Chancery, they should have made their decree conform to the chancery practice.

We should have had our day in Court, and Eaton should have been compelled to prove his case. This omission entitles us to a reversal of the decree. *Bullit v. Bullit*, 4 Bibb, N. Y., 11; *Mills v. Dennis*, 3 John. Ch. R., 367; *Kelsal v. Kelsal*, 2 Mylne & Keen, 409; *Con. En. Ch.*, 62; *Wilkinson's Adm. v. Oliver's Rep.*, 4 Hen. & Munf., 450; *Glaze v. Dayton*, Des., 109; 5 Metcalf, 76; 11 *ib.*, *Whitney v.* ———.

*Crockett, Baldwin & Crittenden*, for Respondent W. H. Gray.

A motion was made on the trial to dismiss this case, because the appeal was not taken in time. The judgment, or decree, defining and settling the rights of these parties, was made nearly two years ago; the subsequent orders were merely auxiliary, reposing ministerial duties, to carry out this decree. The definition of a final judgment is a judgment that settles the merits of a case. The Supreme Court of Alabama, in *Weatherford v. Jones*, 2 Ala. Rep., 176, in which case a decree was made, with a reference to the Master, for an account, etc., holds that a decree is final which ascertains the rights of the parties in litigation; and when acts are to be done, as the decree points out and settles the principles by which these acts are to be regulated, they are, in their character, ministerial. See, 12 Johns., 500; 1 Monroe, 137; 13 Peters, 6; 3 Cranch, 179.

The contrary rule might lead to ruinous delays, for a case might be continued after a decision of the merits of it for many years, from some merely formal final order, and then an appeal be taken nominally from the last judgment, but really from the operative judgment.

1. It is objected, on behalf of the appellants, "that, because the respondents, being holders of claims against an estate, have neither of them alleged nor proved the presentation to the administrator of their respective claims before suit was brought,

they have not placed upon the record, nor proved upon the trial, sufficient facts to constitute a cause of action, nor to give the Court jurisdiction over the subject-matter, and that this defect is not waived or cured."

This objection is fully met in all its parts by the simple proposition that William H. Gray asserted no claim against the estate of F. C. Gray, deceased, within the meaning of the statute of this State.

If this be so, he was of course under no obligation to make any application to F. C. Gray's administrator before commencing his action, nor would his failure to do so, and to allege the fact, and prove it, give rise to any of the questions so fully and learnedly discussed by the appellants' counsel under this head.

If his first inquiry, "are the respondents holders of claims?" be answered in the negative, the whole point, with all its incidents, is disposed of.

We have no hesitation in so answering it, upon the manifest meaning and intention of the Statute to Regulate the Settlement of the Estates of Deceased Persons, §§ 128, 131, 133, 139, 147, 222, 150, 228, 249.

The object of the suit is to establish the fact that the property is not the property of the estate, but is partnership property, and the complaint of the plaintiff not only prays, as stated in the appellants' brief, "That one-third of the same be adjudged and decreed to belong to him, under said partnership agreement, and that partition thereof be made between himself and the defendants," but in addition, "that said copartnership be adjudged to be dissolved, and the accounts thereof be finally adjusted and settled according to the rights of the copartners, and for such other and further relief as in equity and good conscience he is entitled to."

It is true, the administrator of F. C. Gray is made a party defendant, but he is sued, not for the purpose of subjecting the property of the estate in his hands to the payment of a debt due from the intestate, but to take out of his hands property of which he has unlawfully acquired the control; property which does not belong to the estate, and to subject it to all the prior claims to which it is liable as partnership property.

The proposition on which the whole case of the plaintiff rests, is that the estate had no interest in the property, except that which might remain after the partnership affairs were settled. If the partnership did in fact exist as alleged, then properly only the interest of the deceased partner, F. C. Gray, in the property, should have appeared in the inventory of his estate, and only that interest would be represented by his administrator. That interest might be appraised, but its actual value could be ascertained upon the final settlement of the affairs of the firm, and that settlement the surviving partner had the right to make,

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subject to the liability to account to the administrator. See section 198 of same act.

It may be remarked here that the failure to keep this in view is calculated to present an erroneous aspect of the whole case. Throughout the brief of appellants, it seems to be intimated, if not directly assumed, that all the property was the property of the estate. The very question to be determined in the case of *W. H. Gray v. Palmer* and others, was whether it was the property of that estate, or the property of a partnership, and like other partnership property, to be subjected to the payment of partnership debts.

2. It is further objected by the appellants, that "the Court never had jurisdiction over the person of Franklina C. Gray," because the service of process on her was defective.

The affidavit of publication is made by L. Humphreys, "clerk;" which clearly means sole clerk in the office. If he had styled himself a clerk in the office, there might be some room for objection, as in that case he might have been a subordinate and not the principal clerk. But the terms *clerk* and *the clerk* implying that he was the only clerk, show necessarily that he was the person intended by the statute; the object of which was, that the affidavit should be made by some one in the office, who, from his position, was presumed to have a knowledge of its business.

3. The third proposition is, that the complaints do not allege the existence of such a partnership as to entitle the plaintiffs to file a bill in equity as partners.

It is not at all material to inquire whether there can be such a thing as a universal partnership. We can not see, however, if parties choose to make such an arrangement, what principle of law forbids it? The bill charges, that for considerations therein recited, the parties agreed that money made or property acquired in California, as well in a commercial business established by them, as the purchase and sale of real estate, they were to be equally interested, as in all other business enterprises. We are not aware that it has ever been held, that if A and B agree to go into general business on joint account, such agreement would not be binding, or if the agreement were executed, that the rules governing partnerships would not apply. The case in 5 *Mason* maintains no such doctrine—nor any other case or authority cited. In order to constitute a partnership, there must be community of profits and losses; but we supposed whenever this existed, however small or extensive the business, it mattered not how many or how few were the subjects or objects of the co-partnery, it was technically and legally a partnership.

Story on Partnership, § 92, p. 135, states the rule, which is a sufficient reply to all the remarks of the appellants' counsel in this respect.

As to mutuality, in every partnership the rights and obliga-

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tions are mutual. In this, the contract as well bound plaintiff as F. C. Gray; and the consideration was this mutual agreement: both were to give their services, etc., and each was to get a given share of property and profits. Something is said about "dormant partners;" but the relevancy is not perceived; nor is it admitted that there could not be a dormant partner as to real estate, as well as anything else. But here the allegation is, that this firm did business under the style of F. C. Gray & Co., and that the business of the firm embraced the purchase of real estate, etc.; that the real estate was purchased in the name of F. C. Gray; but this did not make the real estate the property of F. C. Gray, any more than if a bale of goods was bought in the name of W. H. Gray, it became his individual property.

Issues were sent to the jury, who found for the plaintiff. A motion was made to set aside this finding, which was denied by the District Judge. After this, the case was submitted, on the papers, to the Court, and a final decree rendered from which the appeal is prosecuted. It is alleged, that this decree was rendered by consent. The record does not so state, and we are not aware of any rule of law which allows the argument or statements of counsel at the bar to be given in evidence to qualify, much less to contradict a judgment or decree. But even if the counsel for defendants, seeing or thinking that the case could not be further defended, agreed to a decree, we by no means admit that the decree, for this reason, loses any of its force. It must be matter of discretion on the part of counsel, to consider how far, or whether, and in what mode, they will conduct or defend a cause; and this rule applies to attorneys of infants, or of guardians *ad litem*, as well as all others; and we have been referred to no authority which declares otherwise.

4. The decree contrary to the weight of evidence. First, we say that the finding of the Court upon the facts is entitled to great consideration by the Appellate Court, and will not be disturbed, unless there be a decided preponderance of testimony the other way. Besides this, we have a verdict of a jury upon the evidence. It is true, that it has been held in this Court in this case, that the verdict is not conclusive. But it is entitled to some weight, else there would be no necessity for it. It may well be doubted whether in a chancery case, under our practice, an issue found by a jury was not designed to have more weight than an issue under the old chancery system. Sec. 9, p. 315. But, if only as much, then we submit that the verdict is entitled to very great weight, and especially when the same Court which tries the case, presides over the trial of the issues, and refuses to set aside the verdict. 2 Story's Eq. Jur., § 1478.

*Glassell & Leigh* for Respondent Eaton.

The respondents were not holders of claims against an estate.

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Each complaint alleged the existence of a partnership; and that the property in controversy was the property of the partnership.

The property in controversy was not the estate of the deceased partner, but the property of the respective partnerships.

The interest of each partner in the partnership property is his share of the surplus after the partnership accounts are settled and all just claims satisfied. 3 Kent's Com., 8th ed., 37; Collyer on Part., 4th Am. ed., § 125.

One partner, after the dissolution of a partnership, has no exclusive right to any part of the partnership funds until the partnership accounts have been settled, and a balance in his favor ascertained. *Canfield v. Hard*, 6 Conn., 180; 3 Kent's Com., *ubi supra*.

Upon the decease of one partner, his share of the movable stock and effects of the partnership, subject to the partnership debts, devolves to his personal representatives, who thereupon become, both at law and in equity, tenants-in-common with the surviving partners. Collyer on Part., 4th Am. ed., § 129; 3 Kent's Com., *ubi supra*; Story on Part., § 346; Gow. on Part., 3d ed., 351.

Real estate acquired with partnership funds, for partnership purposes, is, in equity, regarded as partnership property. Collyer on Part., 4th Am. ed., § 135, and notes; 3 Kent's Com., 8th ed., 38; Story on Part., §§ 92, 93. And this is so, *a fortiori*, when, as is alleged in the present case, it was a part of the business of the partnership to buy and sell real estate.

Notwithstanding a conflict in the authorities as to whether, upon the death of a partner, real estate so acquired is to be deemed in equity, for all purposes, personal estate, it is clear that it is so deemed as to the payment of partnership debts, the adjustment of partnership rights, and the winding up of the partnership concerns. *Hoxie v. Carr*, 1 Sumn., 173, 182, 183; Story on Part., *ubi supra*; 3 Kent's Com., *ubi supra*.

For these purposes, at least, real estate, belonging to a partnership is treated, in equity, as belonging to the partnership, like its personal funds, and disposable and distributable accordingly, however the title may stand at law, or in whosoever name or names it may be; and the parties in whose names it stands, as owners of the legal title, will be held to be trustees of the partnership, and accountable accordingly to the partners according to their several shares and rights and interests in the partnership as *cestuis que trusts*, or beneficiaries of the same. Story on Part., *ubi supra*; Collyer on Part., *ubi supra*; 3 Kent's Com., *ubi supra*.

And these principles are recognized by the "Act to Regulate the Settlement of the Estates of Deceased Persons." Stats. at

Large of 1851, chap. 124, § 198; Comp. Stats., 405; Wood's Cal. Dig., 411, Art. 2317.

In the case of *Gray v. Gray et al.*, the alleged defects are:

That the affidavit of publication was not made by the printer, or his foreman, or principal clerk.

It appears that the affidavit of publication was made by the "clerk" in the printing-office. The inference is, that it was made by the sole, and, consequently, the principal clerk.

It is well settled that a substantial compliance with the requirements of such statutes is sufficient. See *Phillipps on Ev.*, Pt. II. *Cow. & Hill's Notes*, 3d ed., 462.

In the case of *Eaton v. Gray et al.*, the alleged defects are:

1. That the said order contains no direction to deposit a copy of the summons and complaint in the post-office;

2. That the affidavit for the said order showing that the defendant resided in the State of New York, should have shown either at what place in that State the defendant resided, or that the deponent did not know; and

3. That the affidavit of publication was made by a book-keeper.

We will consider the first and second of the alleged defects collectively.

The affidavit in this case complies fully with the requirements of § 30 Pr. Act, and the requisite facts appeared by the affidavit to the satisfaction of the Court.

But when the residence of the defendant is not known, publication of the summons in the prescribed mode alone is sufficient.

This matter is obviously confided to the sound discretion of the Court; and when the affidavit contains all the affirmative facts required by the statute, and is satisfactory to the Court, an Appellate Court surely will not declare the proceedings invalid because the affidavit omits to state negative facts, which the inferior Court did not require to be stated.

In *Story on Partnership*, §§ 72, 37, it is laid down that partnerships, at the common law, may be divided into three classes: universal partnerships, general partnerships, and limited or special partnerships; that by universal partnerships, we are to understand those in which the parties agree to bring into the firm all their property, real, personal, and mixed, and to employ all their skill, labor, services, and diligence, in trade or business, for their common and mutual benefit, so that there is an entire communion of interest between them; and that such contracts, although of rare existence, are within the scope of the common law. This classification, it is shown, was fully recognized by the Roman law.

In the case of *Goesele v. Bimeler et al.*, 14 How. U. S., 589,

607, the Supreme Court of the United States decided that there is no legal objection to a universal partnership.

It is also contended that there can be no dormant partnership in the purchase and sale of real estate.

The authorities cited in support of this proposition show that the law is the reverse. See Story on Part., § 63; *Pitts v. Waugh*, 4 Mass., 424; *Smith v. Burnham*, 4 Sumn., 435. See, also, Collyer on Part., § 3, 4th Am. ed., and cases there cited; *Ib.*, § 51, and notes and cases cited.

The counsel for the appellants contends that "the instrument set out in the complaint was not an agreement for a partnership, but simply a conditional sale to Eaton of one-fourth of the property, at the time owned by Gray, together with its accumulations."

It was, most clearly, an agreement for a partnership.

What constitutes a partnership?

A community of interest in the partnership property, and a community of profit in the partnership business. Collyer on Part., 4th Am. ed., § 3, et seq.; Story on Part., § 2, et seq.; 3 Kent's Com., 8th ed., 24; *Champion v. Bostwick*, 18 Wend., 183.

This instrument establishes a perfect community of interest in the partnership property, and a perfect community of profit in the partnership business.

In the cases now under consideration, a guardian *ad litem* for the infant was appointed by the Court, according to law. See Prac. Act, §§ 9, 10.

This guardian *ad litem* consented to the entry of the decree; and the decree was thereupon entered by order of the Court.

Infants are as much bound by the conduct of those who conduct their case as adults, provided such conduct be *bona fide*. 1 Dan. Ch. Pr., 2d Am. ed., 210 top paging, citing *Tillotson v. Hargrave*, 3 Mad., 494.

BURNETT, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The learned counsel for the appellants has made several points, some of which apply to both causes, and others to only one.

But before we proceed to examine the points made by the appellants, we must first dispose of the motion made by the plaintiffs to dismiss the appeal upon the ground that it was not taken within the time limited by the statute. The fate of the motion depends upon the question whether the decree rendered twenty-seventh of October, 1855, was interlocutory or final. If final, the appeal was too late. If interlocutory, the appeal was in time.

The decree adjudges that a partnership existed between Eaton and the deceased, and a different partnership between

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William H. Gray and the deceased; each partnership embracing all business and all property, real and personal, of the parties; and decides that the partnership of William H. Gray was subject to that of Eaton. The decree settled the proportionate interest of each partner, and directed an account of the partnership transactions to be taken by a commissioner appointed for that purpose. It was also ordered that when the commissioner shall have made his report, and the same shall have been passed upon by the Court, the commissioner should proceed to sell all the real and personal property of the partnership, allowing all of the parties to become purchasers if they chose.

In the case of *Ray v. Low*, 3 Cranch, 178, it was held that a decree for a sale of mortgaged premises, upon a bill to foreclose, was a final decree. The same doctrine is held in the case of *Whiting et al. v. The Bank U. S.*, (13 Peters, 6.) So, in the case of *Travis v. Waters*, (12 John., 500,) it was held that a decree on a bill for a specific performance on the coming in of the Master's report as to the quantity of land to be conveyed and the payments made, directing the balance due to be paid, and the conveyance to be executed, was a final decree. So, in the case of *Field v. Ross*, (1 Mon., 133,) it was decided that a decree ascertaining the amount of complainant's demand, directing a sale and ordering the payment of costs, was final. The Court said that the sale "was only a ministerial act, to effectuate what was decreed."

But it will readily be seen that these cases do not come up to the circumstances of this case. In the cases mentioned above, the sum due to the party was specifically ascertained, and certain specified property directed to be sold. The acts necessary to carry the decree into full effect were clearly ascertained and specifically stated. In the present case, the fact of partnership, and original proportion of each partner in the partnerships, were settled; but the partnership accounts had to be taken, and the question, whether any of the real estate should be sold, and what portion, remained open. The decree had not ascertained any specific sum as due to any one or more of the partners. It was evidently not a final decree, but merely interlocutory. This decree was necessary before any accounts could be taken, and the present relative rights of the parties determined. The decree did not settle their *present* condition; but only the *original* terms of the partnership. It might turn out, upon the accounts being taken, that Eaton and William H. Gray had received their full share, conceding that the decree was correct as to the original terms of the partnership. In such case, no appeal would be necessary. (1 J. J. Marshall, 498; 4 Sum., 495; 6 How. U. S. C., 209; 8 Wend., 219; 1 Ral. V. R., 20; 2 Com., 571; 10 Whea., 502.)

Coming, then, to the points made by the appellants, the first

objection urged by them is, that the plaintiffs were holders of *claims* against the estate of Franklin C. Gray, deceased, and could sustain no suit in the District Court, unless they had averred and proved that they were presented to the administrator for approval or rejection. This was not done, and it is insisted that the District Court had no jurisdiction. This objection is fatal, if it be true that the plaintiffs were holders of *claims* against the estate.

The word *claim* is certainly a very broad term, when used in certain connections, and in reference to certain matters. Lord Coke truly says, that "the word *demand* is the largest word known to the law, save, only, *claim*; and a release of all *demands* discharges *all right of action*." Chief Justice Nelson says: "the word *claim* is of much broader import than the word *debt*, and embraces rights of action belonging to the debtor, beyond those which may appropriately be called debts." 2 Hill R., 223.

But however broad may be the general meaning of this term, we must look to the statute to ascertain the sense in which it is *there* used.

The Statute to "Regulate the Settlement of the Estates of Deceased Persons" requires the executor or administrator to give "notice to *creditors* of the deceased, requiring all persons having *claims* against the deceased to exhibit them." (§ 128.) "That every claim presented to the administrator shall be supported by the affidavit of the claimant that the *amount* is justly *due*, that no *payments* have been made thereon, and that there are no offsets," etc. (§ 131.) That "every *claim*," when allowed, "shall be filed in the Probate Court, and be ranked among the acknowledged *debts* of the estate, to be paid in due course of administration." (§ 133.) That when "any claim shall be presented to the administrator or the Probate Judge, and he shall be willing to allow the same in part, he shall state in his endorsement the *amount* he is willing to allow. If the *creditor* refuse to accept the amount," etc. (§ 139.) So, if the executor or administrator is himself a *creditor*, his *claim* shall be duly authenticated. (§ 149.) He is required to return a statement of all *claims* against the estate which have been presented to him; and "in such statement he shall designate the name of the *creditors*, the nature of each claim, when it *became due*, or will become due, and whether it was allowed by him. (§ 147.) In other sections of the act the word *claim* is used in the same manner. (§§ 150, 220, 222, 228 to 249.)

It would seem to be clear, from the different sections of the act, taken and construed together, as well as from the nature and reason of the case, that the words *claimant* and *claim* are used as synonymous with *creditor* and *legal demand for money*, to be paid out of the estate.

But it was not the scope and purpose of these suits to establish

claims against the estate to be paid out of it in due course of administration. Conceding the allegations of the complaints to be true, the surviving partners were entitled to the possession and management of the partnership effects; and the only interest that the heirs could have in the partnership assets, was the net interest of their ancestor, after the partnership debts were all paid. It was necessary to file the bills, and make the administrator, the widow, and the infants, parties, for the reason that the real estate stood upon the record in the name of the deceased. In the theory of our system the estate of the ancestor, personal and real, vests in the heir, subject to the possession and lien of the administrator for the payment of debts and the expenses of administration. As the real estate was held in the sole name of the deceased, and the administrator had possession of the personal property, the whole belonged, *prima facie*, to the estate. To rebut this *prima facie* ownership and right to possession, and legally vest the property in the partnership, it was necessary to bring these suits. The primary object was to obtain the control of the partnership property, and the sale of so much of it as would be required to pay the partnership debts and for a partition of the remainder of the real estate, if any. These complex objects could only be accomplished by proceedings in the District Court. The Probate Court had no judicial means to do this.

The second objection made by the appellants is, that the Court had no jurisdiction of the person of Franklina C. Gray. In the case of *Gray v. Eaton* and others, the affidavit of publication was made by "L. Humphreys, clerk in the office of the Placer Times and Transcript," when the statute requires the affidavit to be made by the *principal* clerk. But this objection is not well taken, as it is clear from the affidavit that there was but one clerk in the office. When there is but one clerk his affidavit must be sufficient, and it is unnecessary for him to improperly describe himself as *principal clerk*.

In the case of *Eaton v. Palmer* and others, the affidavit of Eaton states that Mrs. Gray and child were residents of the State of New York, but does not state in what portion of the State they resided, nor that the affiant was not informed of, or did not know the fact. In the amended complaint of Wm. H. Gray, in the case of *Gray v. Eaton* and others, the fact is stated that Mrs. Gray and child resided in Brooklyn, in the State of New York. The plaintiff Eaton then had notice of the place of residence of the two defendants, and should have so stated in his affidavit. The result of his failure to state this fact, was that the Court did not direct a copy of the complaint and summons to be deposited in the post-office. This defect was not cured by the appearance of the mother in her own behalf. The twenty-ninth section of the Practice Act requires the service of the summons when the

suit is against a minor *under* the age of fourteen, to be made by delivering a certified copy of the summons and complaint to the infant *personally*, and *also* to his father, mother, or guardian. When the infant is over the age of fourteen, the service is only to be made upon him, as he may choose his own guardian. As the statute requires personal service of the summons upon the infant, although under the age of fourteen, it is clear that a copy should have been put into the post-office directed to the infant in the same manner as if over the age of fourteen. The Court had no right to appoint a guardian *ad litem* until the infant was properly brought into Court.

We are compelled to give the twenty-ninth section of the Code this construction, although there may seem to be no good reason for requiring personal service upon a minor under the age of fourteen. The language of the second subdivision is too clear to admit of any doubts; and it is not our right to make, but only to construe, the statute. (Sed. on Construction, pp. 293, 395, 306, 309, 311, 379.) In the New York Code, the service was only required to be made upon the guardian when the minor was under the age of fourteen. (§ 113, First Rep. of Com., 134.) In the act of April 22, 1850, (Statutes of 1850, 430,) the same provision as that contained in the twenty-ninth section of our Code is found, with a slight difference in the grammatical structure of the sentence. So, in the Practice Act of 1850, personal service was required upon a person of unsound mind, as also upon his guardian; while in our present Code, the personal service upon the lunatic is dispensed with. These facts show that the provision requiring personal service upon the minor under the age of fourteen, and also upon his guardian, is not the result of a misprint or a clerical mistake, but the deliberate will of the Legislature. As such, it is our duty to carry it out.

The third objection made by the appellants is, that the complaints do not allege the existence of such a partnership as to entitle the plaintiffs to file a bill *as partners*; and it is questioned whether there can exist such a relation as a *universal partnership*.

The question in this case regards the rights of partners as between themselves. A partnership, as between the partners themselves, may be defined to be a contract of two or more persons to unite their property, labor, and skill, or some of them, in the prosecution of some joint and lawful business, and to share the profits in certain proportions.

In most partnership agreements there is a stipulation to share the profits and bear the losses, in certain proportions. But if parties are so disposed, they are competent to agree that all the partners shall participate in the profits, while a portion shall bear all the losses of the original capital. If, for example, A, B, and C, should agree that A and B should put in the sum of \$10,000 each, and C, the sum of \$20,000; and that all the partners should

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give their personal attention to the partnership business, and share the profits in equal proportions, but in case of any loss of any portion of the original capital, that loss should alone fall on A and B, there would seem to be no doubt of this being a partnership.

There can be no doubt, at this day, that a partnership may exist in the purchase and sale of lands. (Story on Partnership, § 83; Collyer, § 51, note.) But such a partnership can only exist where the contract is reduced to writing. (Story, § 83.) And it is not necessary that the partners should be jointly concerned in the *original* purchase, where the interests of the partners are afterwards mingled. But the partners must, by the contract, be jointly concerned in the *future* sale. (3 Kent, pp. 25, 26.)

In reference to this subject, Mr. Justice Story remarks: "Nor is there in reality, as between the parties themselves, any difference whether the partnership property, held for the purposes of trade or business, consists of personal or moveable property, or real or immoveable property, or of both, so far as their ultimate rights and interests are concerned."

This language is very clear and distinct. As *between the partners*, the partnership property may consist *either* of real or personal estate, or of *both*, and in each case their ultimate rights are the *same*. And it does not matter in whose name the real estate may be held, he is only a trustee for the partnership, and the real estate, for the purpose of disposal and distribution, is to be treated as personal estate. An exception may be stated, as where there are no partnership debts to pay, in which case the real estate should be partitioned, if practicable. (§§ 92, 93.) And this being the true character of partnership real estate, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance that may be due to him from the firm. (Collyer on Part., § 135, and note.) For the same reason, the widow and heirs have only an interest in the net partnership property, after all the partnership debts are discharged.

But it is insisted that there can not be a *dormant* partnership in the purchase and sale of real estate. This objection would not seem to be well taken, as between the partners themselves there can be no difference, whether the business is commercial or dealing in real estate. As between the partners and third persons, the law in regard to dormant partners will not apply; (Pitts v. Waugh, 4 Mass. R., 424; 3 Kent, 31, note *a*;) and we can see no reason why parties should not be competent to form a universal partnership. There is nothing impracticable in it, or against morality or public policy. Of course such a universal partnership would not be held to exist, unless the intention was clearly expressed.

It is also insisted by the learned counsel for the appellants, under his third point, that though it be conceded that Gray has

stated a case of partnership in his complaint, Eaton has not. The instrument claimed by Eaton to constitute articles of co-partnership is set out in his complaint; and must constitute the sole evidence of the relation existing between him and the deceased. (*Lee v. Evans*, 8 Cal. R., 424.)

The effect of this objection depends upon the true construction of the instrument. The instrument is in an unusual form for partnership articles, and is only executed by the deceased. It purports, in the first part of it, to sell to Eaton one-fourth of all the real and personal property then owned by the deceased, or that might be owned by him within the next two years, or within the time the connection should continue, should it continue beyond the time specified. It was evidently an executory and not an executed contract. Eaton, on his part, was bound to remain with the deceased for two years; at the expiration of which period a division of all property, real and personal, was to be made, unless the parties should wish to continue longer. Among other conditions to be performed were these: "2. That Eaton should unite all the funds he may hereafter become possessed of, in the joint fund, for the purpose of accumulation. 3. All outstanding debts shall be paid out of the joint fund held against the party of the first part." Taking the different portions of the agreement together, and we must conclude that the relation created by it was a partnership. 1. The contract was *executory*. 2. Gray put in all his property. 3. Eaton was to put all his future property into the joint fund, and also his time. 4. These were to be all put into the concern "*for the purpose of accumulation.*" 5. The debts were to be paid out of the "*joint fund.*" 6. A division of all the property was to be made—the one-fourth to Eaton, and the other three-fourths to the deceased. 7. The property to be divided consisted of that put in, with its *accumulations*.

The fourth objection urged by the appellants is that the decree was against the weight of evidence. This objection only applies to the case of *Gray v. Eaton* and others.

It is alleged by William H. Gray that written partnership articles were executed by the deceased and himself, but that the same were destroyed by the fire in June, 1851, in the city of San Francisco. It is certain, from the proof, that the two brothers were in partnership in a mercantile house in San Francisco. But this fact renders it the more probable that the partnership was confined to that house; and that the recollection of the witnesses had relation to that concern, and not to the alleged universal partnership. There is only one witness to prove the contents of the partnership articles, and his recollection does not seem to have been very distinct. The evidence to establish *such* a partnership, after the death of one of the partners, should be clear and full, and not subject to doubt. The circumstances, all

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taken together, leave the greatest room for doubt. We have examined the testimony carefully, and we can not resist the impression that the evidence did not warrant the decree. It would be a greater labor than we can perform, consistently with the other business of the Court, to review the evidence in full in this opinion.

The other points made by the appellants are not important. Our conclusion is, that the decree in the case of *Eaton v. Palmer* and others, so far as it affects the rights of the infant *Franklina C. Gray*, should be reversed, and that the decree in the case of *Gray v. Eaton* and others, should be reversed as to both the appellants, and cause remanded for further proceedings.

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## WHIPLEY v. MILLS.

An appeal is made by filing and serving the notice of appeal. Both requisites must exist, to complete the appeal.  
A failure to notify the adverse party is fatal.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

*Smith, Edwards & Baldwin*, for Appellant.

*Winans & Hyer, and Heydenfeldt*, for Respondent.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The judgment in this case was rendered on the 29th March, 1852. Notice of appeal filed in the Clerk's office April 15th, 1852, and transcript on appeal filed in this Court June 17th, 1857. The record contains no evidence that a copy of the notice was served upon the appellee, as required by the 337th section of the Code.

The appeal is made by filing *and* serving the notice. Both requisites must exist to complete the appeal. If either could be omitted, it would be the filing of the notice. A failure to notify the other party is more material than a failure to file in the Clerk's office. No copy of the notice having been served upon the appellee, he had no opportunity to move to dismiss the appeal. The result was that the transcript is made out and sent up more than five years after filing the notice of appeal. (*Franklin v. Reiner*, 8 Cal. R., 340.)

The appeal must be dismissed.

## PEARKES v. FREER, SHERIFF.

It is not necessary, in an action against a sheriff, to recover damages, (in addition to the \$200 imposed by law as a penalty,) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit.

The right to have a cause tried in a particular county, is one which a party may waive, either expressly, or by implication.

An objection to the venue, if made on grounds appearing in the complaint, must be made at or before the time of filing the demurrer, or it will be deemed waived.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

The facts appear in the opinion of the Court.

*Wm. H. Rhodes* for Appellant.

*R. S. Mesick* for Respondent.

TERRY, C. J., delivered the opinion of the Court—FIELD, J., and BURNETT, J., concurring.

This was an action against a sheriff to recover the damages sustained by reason of his failure to execute and return process, with the addition of \$200 imposed by law as a penalty for such neglect.

A demurrer was interposed to the complaint, on the ground that two distinct causes of action had been improperly joined. This demurrer was overruled, and the defendant failing to appear at the time fixed for the trial, a trial was had, *ex parte*, before a jury, who returned a verdict in favor of plaintiff, and from the judgment entered on this verdict, the defendant appeals.

The errors assigned are: *first*, overruling the demurrer; *second*, refusing to change the venue on application of defendant.

The action was instituted under the sixth section of the act concerning sheriffs, (Wood's Dig., 680,) which provides that a sheriff, for a failure to perform certain duties, "shall be liable in an action to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him."

It is not the policy of the law to promote multiplicity of actions, and by no rule of construction, of which we have any knowledge, can we arrive at the conclusion that the Legislature intended that two suits were necessary to enable a party to avail himself of the remedy given by this statute.

There was no error in refusing to change the place of trial; the right to have a cause tried in a particular county is one which a party may waive either expressly or by implication.

The demurrer to the complaint was filed on the eighth of July,

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1857, and the agreed statement shows, that by agreement of counsel, the cause was set for September 17th; on that day, defendant moved for a change of venue, on grounds which were apparent on the face of the complaint.

In *Reyes v. Sandford*, (5 Cal., 117;) and in *Tooms v. Randall*, (3 Cal., 438,) it was held, that an objection to the venue must be made in the answer, and comes too late after an answer to the merits; it follows, that such a motion on grounds disclosed by the complaint must be made before or at the time of filing demurrer. By filing a demurrer, and consenting to set the case for trial at a particular day, the defendant waived his right to move for a change of venue.

The judgment of the Court below is affirmed, with fifteen per cent. damages for a frivolous appeal.

### GUNTER, EXECUTRIX, v. JANES, GUARDIAN.

A was indebted upon a note and mortgage to B, in the sum of \$40,000. B assigned the note and mortgage to C, and received from him his notes in lieu thereof. Afterwards A mortgaged to C, together with other property, the property previously mortgaged to B, subject to first mortgage, for which C was to advance to A, from time to time, sums of money not to exceed \$12,000, to enable A to pay his debts. By this mortgage C was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the \$12,000 and interest, and in case the rents should not be sufficient for that purpose, and A should not pay within two months after request, then C was to sell, and, out of proceeds, pay the amount and interest so advanced. C, at various times, advanced to A nearly \$12,000, and collected rents to the amount of \$28,000. Subsequently C died, and then his executor collected the rents: *Held*, in an action by A against C's administrator, that C acted in the purchase of the note and mortgage of B as an agent of A, and that A was entitled to the trust fund.

If the plaintiff allege an express trust, it is incumbent upon him to prove it as alleged, but such a trust may be proved by circumstances, and to ascertain the intention of the parties, the Court will consider the *then* existing circumstances.

A mortgagee, who is also a trustee, is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another *cestui que trust*.

A party seeking to enforce a trust against the administrator of a trustee is compelled, from the complex nature of the cause, to ask relief in a Court of Equity. The claimant of specific property is not a creditor within the meaning of the Probate Law, and therefore he is not bound to present his claim to the administrator.

*Per Burnett, J., on re-hearing.*—A trustee can not, by mingling trust moneys with other funds, change his character from that of trustee to that of mere debtor.

The act of either the trustee or *cestui que trust*, without the consent of the other, should not be permitted to change the relation or capacity of the parties.

If the trustee does a wrongful act, then he by the act consents to be treated as a trespasser or debtor, at the option of the *cestui que trust*.

A trustee should never be permitted to defeat the rights of the *cestui que trust*, so long as it is in the power of a Court of Equity to enforce them.

APPEAL from the Superior Court of the City of San Francisco.

This was a bill in equity to recover trust funds in the hands of the administrator of a trustee.

The action was originally brought in the name of Henry Gunter, against William Barber, administrator, with the will annexed of J. J. Starkey, deceased. Subsequent to the rendering the interlocutory decree Gunter died, and the action was revived in the name of the above-named Elizabeth A. Gunter, his widow and executrix. Barber closed his accounts as administrator, and paid over the money in his hands to Janes, the guardian of the daughter of J. J. Starkey and legatee under the will, and Janes, by stipulation, was substituted as defendant in the place of Barber.

On the seventh of March, 1850, Henry Gunter, deceased, was indebted upon note and mortgage to Thomas G. Wells, as agent for James Collier, for money lent, to an amount of from forty to sixty thousand dollars. On that day, Wells assigned the note and mortgage to John J. Starkey, and received from him his notes in substitution. Afterwards, these notes were taken up and others executed in their place by Starkey, to A. H. Dohrman, by the consent and direction of Collier. The notes to Dohrman were four in number, and amounted in the aggregate to \$41,856, all bearing date March 7, 1850, and all payable April 7, 1851, and all drawing interest from date, at the rate of eight per centum per month. On the 9th of March, 1850, a sealed instrument was executed by Gunter and Starkey, wherein it was recited that:

"Whereas, the said Henry Gunter, being indebted to divers persons in divers sums of money, and being at present unable to pay and satisfy the same, hath appealed to and requested the said J. J. Starkey to advance, and he hath agreed accordingly to advance such sum or sums for the liquidation or settlement of the said debts as may be required from time to time, not exceeding the sum of twelve thousand dollars on the security hereinafter mentioned."

By the provisions of the instrument, Gunter mortgaged to Starkey certain premises, "subject to the mortgage incumbrances then affecting the same." The property mortgaged by Gunter to Starkey included, with other property, the premises previously mortgaged by Gunter to Wells. For the purpose of securing to Starkey the repayment of such sums as he should advance, together with interest thereon at the rate of eight per cent. per month, Starkey was empowered to receive the rents and profits of the property, and apply the same to the liquidation of the advances so to be made by him; and in case these rents and profits should not be sufficient for *that* purpose, and Gunter should not pay the same within two months after request, then Starkey was empowered to sell any part of the property subject to the said incumbrances, and out of the proceeds

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to reimburse himself for his advances. Starkey, at various times after the date of the instrument, advanced for Gunter nearly \$12,000, and collected rents to an amount exceeding \$28,000. On the 22d day of January, 1852, Starkey departed this life, and his executor afterwards collected various sums as rents from the mortgaged property. The Dohrman notes were destroyed by the fire of May 4, 1851, and the holder neglected to present them to the executor within the time limited by the statute, and they became barred. They were afterwards assigned to Gunter, upon condition that one-half the amount he might recover in this suit should go to Dohrman; and Dohrman and Collier executed to the estate of Starkey a release, which was to be filed by Gunter as a paper in this suit. The bill in this case was filed by Gunter, alleging that Starkey, in purchasing the note and mortgage of Gunter to Wells, acted as his agent and for his benefit, and claims the trust funds in the hands of the administrator, the executor having resigned before this suit was commenced.

The plaintiff had a decree in the Court below, and the defendant appealed.

*Eugene Casserly and Delos Lake* for Appellants.

Trust alleged, an express trust: As to its legal character in the classification of trusts, it is an express trust; and it was so admitted and claimed to be on the argument at bar by at least one of respondent's counsel.

Trusts, like other contracts, are divided into, first, express; and second, implied.

An express trust may be proved either by positive and direct testimony, such as a declaration in terms, either written or verbal, or by such facts and circumstances as raise a necessary and violent presumption of such a declaration.

The express trust alleged, is, that Starkey in buying the Gunter notes and mortgage from Wells, agreed expressly to buy and hold them for Gunter's benefit; and that he received the rents and profits of Gunter's property also under an express agreement to hold them merely as indemnity against any sums he might be compelled to pay on his notes given to Wells on buying the Gunter mortgage.

Is there any adequate proof, either direct or presumptive, of such an express trust?

That there is any direct proof is not pretended. But it is said that the presumptive proof is sufficient. Let us see if this be so.

In the first place it is to be remarked there is no presumption in favor of such a trust. The *onus probandi* is strictly on him who alleges it.

The rule was laid down long ago in *Cook v. Fountain*, reported at length in 8 Swanst., 590-1.

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This has been the doctrine ever since, both in England and America. *Gratz v. Prevost*, 6 Wheat., 481; *Boyd v. McLean*, 1 Johns., 590; *Whelan v. Whelan*, 3 Cow., 580.

Next—there are three requisites of a valid trust, the want of any one of which will cause it to fail:

1. The intention to impose a trust on the donee must be certain.

2. The terms of the trust must be certainly ascertained, viz.: as to the property on which the trust is to attach, the parties for whom the benefit is meant, the interests they are respectively to take, and the manner in which the trust is to be performed.

3. It must be accepted on those terms by the trustee. *Adams' Equity*, 27, 28-9, and note 1; *Steere v. Steere*, 5 Johns., 12.

The plaintiff having alleged in his bill an express trust, it was not competent for him to fall back on an implied trust, to make out his case. He could not set up one kind of a trust in his pleadings, and another kind in his testimony. *James v. M'Kernon*, 6 Johns., 542, per Kent, C. J., 563-4, and *Spencer*, 561; *Forsyth v. Clark*, 8 Wend., 653-4.

The rule is perfectly established that as between the mortgagor and the assignee, the latter has a right to receive the whole debt, no matter what he paid, and though he paid nothing. *Anon.*, 1 Salk., 155; *Phillips v. Vaughan*, 1 Vern., 335; *Morret v. Paske*, 2 Atk., 53.

Starkey, on the ninth of March, 1850, was a mortgagee of two mortgages made by Gunter, with a certain qualified trust annexed to the latter.

Under the latter, so far as he was a mortgagee, it is quite clear that no trust relation existed between him and Gunter, in the wide sense in which it is contended for the plaintiff, and which is indispensable to sustain the bill; namely, so as to deprive him of the right to make a profit for himself out of the transaction, by enforcing the first mortgage without reference to the sum paid by him.

This vital distinction between a mortgagee and a trustee, in its special sense, has, at least for many years, been recognized in the English Courts. It must be still more marked in this State, in view of the doctrine constantly maintained in this Court, that the mortgage is merely an incident to the debt. In England, the great case in point is *Cholmondeley v. Clinton*, referred to as high authority, 10 Wheat., 174,; 2 Jac. and W., 177, 182-5, by Sir Thomas Plumer, M. R., upon a re-argument reversing Sir W. Grant's decision, and 190-1, by Lords Eldon and Redesdale, on appeal in the House of Lords, affirming Sir T. Plumer's decision. All the leaders of the chancery bar—Romilly, Sugden, Leach, Shadwell, besides Mr. Charles Butler, of the law bar—were employed. One or two points of difference between a mortgagee and a (general) trustee, are conclusive. In the first

place, the mortgagee holds the property pledged for his own security and benefit. Then, his estate is adverse and paramount to that of the mortgagor, so that he may deprive him of the possession and of the title, and may acquire it for himself against his wishes, which a trustee never can. A mortgagee in possession is entitled to the rents and profits until his debt is paid, in his own right and as his own property, and is liable to the mortgagor for nothing but the surplus. 2 Jac. and W., 188. He may also set up the Statute of Limitations against the mortgagor, which a trustee never can. 2 Jac. and W., 183; *Hughes v. Edwards*, 9 Wheat., 489, 497.

It is true that under the second mortgage Starkey received the property under a trust: first, to apply moneys in payment of debts; and, second, to secure him for his advances. The latter was no more than the law implies in every mortgage to secure money loaned, or to be loaned.

The deed of March 9, could not, in any case, convert the previous purchase of the mortgage from Wells, by Starkey, into a trust transaction. But admitting, for the argument, that the deed of March 9, 1850, made Starkey, in the widest sense, a trustee, and throwing out of view its distinct recitals, it does not follow that it operated, by relation, so as to convert the previous purchase of the Gunter notes and mortgage into a trust transaction for the benefit of Gunter.

This must be, of course, if at all, by operation of law; there being no proof of any agreement, written or oral, between the parties that the deed should have that effect. But, by operation of law, it can not have taken place, for the law is all the other way.

It is abundantly settled, both in England and America, by at least two cases of the highest authority, (there being none to the contrary,) that when one, who is a creditor, afterwards becomes the trustee of his debtor, neither his debt nor his right to enforce the same, by all legal means, adversely to his debtor, is affected in the least.

*Prevost v. Gratz*, 6 Wheat., 481, is a case in point, not only upon this question, but in its general analogy of law and facts to the present case.

As to the account and receipts, etc., signed by Starkey as trustee, etc. The account of September 23, 1851, rendered by Starkey, is made a part of the plaintiff's testimony. Why, is not very clear, unless that it is made out with and signed "J. J. Starkey, trustee;" of which *descriptio personæ* hereafter. In all other respects it makes heavily against the plaintiff's theory. The account, it will be observed, has a debit and credit side. In the former, Starkey charges Gunter with all cash paid out by him. On this side appears an item which, though obscurely worded, refers, it is said, to Starkey's promissory notes given to

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Wells upon the purchase of the Gunter notes for \$41,856. Granting this for the present, it certainly charges them as so much cash paid out by Starkey. The item is :

"April 7. To p. n. given to T. G. Wells amt. of mortgage, \$41,856."

At that date Starkey had in fact paid but \$6,660 on these notes. By the plaintiff's theory, Starkey, acting for Gunter and not for himself in the purchase of the mortgage, and holding the rents and profits as indemnity merely, should have charged him only with this last amount.

Instead of that, however, Starkey charges the whole amount of his notes as so much cash paid out, an absolute debt for so much, due him by Gunter, and he strikes a balance as then due him by Gunter, of \$34,196. This, he says, is "exclusive of interest," showing that he intended to charge interest to Gunter on the whole amount. All this falls in with our theory of the case, that Starkey, in buying the Gunter mortgage, acted as a purchaser, not as a trustee, and that the transaction created at once a debt due from Gunter to him.

This paper also proves two other important facts, namely : that Starkey, as early as September 23, 1851, was applying the rents upon the transaction of the purchase of the mortgage, as so much money in payment of a debt due to himself, (Starkey;) and that Gunter was fully apprised thereof by the rendering of such an account.

This account Gunter received and has kept ever since without objection, which, of course, estops him from raising any now.

As to Starkey's description of himself as "trustee," etc., very much stress has been laid upon the fact that, in the account of September 21, three or four receipts and an agreement respecting Gunter's property, Starkey should have styled himself "trustee." Yet how much does this prove?

That he was a trustee? Conceding this, how far does it aid the plaintiff? "Trustee" of what?—of course, of a "trust." But when the plaintiff has got thus far, and it is really as far as these signatures help him, he has advanced but a very little way towards making out his case.

There is no magic, it has been well said, in the words "trust" and "trustee," nor is the meaning of them very definite, except as they are made so by proof.

The deed of March 9 declared a trust, an incidental one it is true, but still a trust; and it seems to have been generally known between Gunter and Starkey as the "trust deed," doubtless to distinguish it from the mortgage assigned by Wells to Starkey. It was under that deed, probably, that Starkey first went into the receipt of the rents and profits which, with the payment of

them, appears throughout to have been the main or only business of the trust.

Or, Starkey may have described himself as trustee in the same limited sense in which every mortgagee is a trustee: though this is less likely. The probability is, rather, that he used the word in its loose colloquial sense.

Besides, the rule is established, in the construction of wills, for instance, that the words "upon trust" and "trustee" will not, of themselves, create a trust where that is at variance with the general scope and purpose of the instrument. Lewin on Trusts, 174, (22 Law Library.)

The verbal admissions of Starkey: For many reasons, these are not sufficient to establish the alleged trust.

In the first place, they were made by a dying man the day before his death, after he had been for a considerable time shut up in a sick room. They were never again brought to his attention, and the next day the voice that might have corrected or explained them, was silenced for ever on earth.

In the next place, they are obviously the incoherent and rambling utterances of a breaking spirit, struggling with a great mass of matters, conceiving and expressing nothing distinctly. For instance, the statement about the "compromise bond" with Wells. This could not have been true. Wilson could find no such document among Starkey's papers, though he looked for it. Wells, himself, one of the plaintiff's witnesses, testifying in the full vigor of his faculties, after his attention had been particularly called to the point, says there never was any such agreement, written or verbal.

But besides the insuperable intrinsic improbabilities of this testimony, there is a sound and established rule of equity as to verbal admissions, which denies to it any serious weight as evidence.

Rule against parol testimony of admissions to make out a trust: The rule is, that parol evidence of alleged admissions of the person sought to be charged as a trustee, is always to be regarded with very great jealousy, and unless corroborated by proof in writing is rarely sufficient.

Botsford v. Burr, 2 Johns., 405, is not only a leading case to the point, but, in many respects, has a striking resemblance to the present.

Steere v. Steere, 5 Johns. Ch., 2, is also a very analogous case.

It is, perhaps, needless to advert to the other rule which regards such testimony with increased jealousy when brought forward after the death of the alleged trustee, when the protection of an answer can not be had. Adams' Equity, 33, p. 168, *in notis*, and cases there cited; Chalmers v. Bradley, 1 Jac. & W., 62-63.

In any case, the entire testimony, being in contradiction of the covenants and recitals of the deed of March 9, is inadmissible,

on the known rule that parol testimony is never admitted to contradict a deed. *Botsford v. Burr*, 2 Johns. Ch., 405, 415. Either as to its expressed or implied effect. *Willis' Trust.*, 51-2; *Fordyce v. Willis*, 3 Brown Ch. R., 577.

If there was a trust or agreement, such as is alleged, then, upon the plaintiff's theory, his right to the fund in the hands of Thomas (Starkey's executor,) was perfect, whenever the Dohrman notes became barred, for want of presentation under the Probate Act. This happened March 15, 1853, and from and after that date the claim of the plaintiff became one which he should have presented to the executor of Starkey. Not having done so within ten months afterwards, it is itself barred by the same statute.

The first publication of notice to creditors by Thomas, executor, was given May 15, 1852, and the time for presenting claims expired March 15, 1853. Probate Act, § 130, Comp. Laws, 395. Claims not due or contingent must be presented within ten months after they become due or absolute. *Ib.*

1. Is this a claim within the meaning of the Probate Act?

There seems no reason for doubting it.

The language of the act is comprehensive, beyond example, it is believed. The notice to creditors is one "requiring all persons having claims against the deceased to exhibit them," etc. The Texas statute, from which ours is mainly copied, requires all "moneyed claims against the estate" to be presented. The alteration seems to have been studiously made, and is significant.

For the purposes of this argument it may be admitted that a claim for a trust fund, as such, does not come within our statute, on the ground that such a fund is not assets in the hands of the executor, and that as to such he is a trustee of the *cestui que trust*.

Was there, then, any trust fund, properly so called, in this case?

To escape the bar of the Probate Statute, the plaintiff must show there was.

The rule is that the proof to fix a trust character upon money or other property, so as to make it a trust fund, or trust property, and enable the *cestui que trust* to follow it, must be quite clear. *Adams' Equity*, 363-4; *Hart v. Bulkley*, 2 Edw. Ch. R., 70.

In *Hourquebie v. Girard*, 2 Wash. C. C., 212; *Scott v. Sherman*, Willes, 403-4; *Whitcomb v. Jacob*, 1 Salk., 161; *Robson v. Wilson*, per Kenyon, quoted 1 Marsh. Ins. 295, or Paley Agency, \*90 *in not.*; *Tooke v. Hollingsworth*, 5 T. R., 226-7, per Kenyon; *Vernon v. Vawdry*, 2 Atk., 119.

The two following cases may show under what circumstances money or property will be declared a trust:

In *Kip v. Bank of New York*, 10 Johns., 62, the trustee having deposited the trust money in the defendant's bank in his own name, but in an account by itself, it was held to be a trust fund,

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and that his *cestui que trust* was entitled to it as against his creditors. The Court (Kent being C. J.) placed it distinctly on the ground that the money had been so kept that it was traceable as a separate fund.

*Ex parte Chion*, 3 P. Wms., 187, *in not*. A factor having bought South Sea stock for his principal abroad, took it in his own name, but entered it in his books as bought for his principal. Held, that the latter was entitled to the stock against the factor's assignee in bankruptcy.

If the alleged trust is proven, we admit that the money collected by Thomas must be regared as a trust fund; the same having been collected by him as executor of Starkey. The authorities to this effect are too strong to be combated. *Burdett v. Willett*, 2 Vern., 638; *Scott v. Surman*, Willes, 400.

We contend that there was no trust fund, no trust property, coming as such to Thomas, as executor of Starkey, upon the latter's death.

If there was not, then Gunter's demand was simply a debt due him from the estate, and therefore a claim within the Probate Act, which he should have presented in writing, duly attested, within ten months from the first publication of notice to creditors, namely, on or before March 15, 1853, or within ten months after that. He has not done so—this suit having been commenced June 20, 1854; and it is therefore barred.

The following cases are cited as only a few of those at hand: *Jewett v. Cunard*, 3 W. & M., 323, a case almost precisely analogous to this; *Kane v. Bloodgood*, 7 Johns. Ch., 90, a great and leading case in this country, in which Ch. Kent corrects the doctrine laid down too broadly by him in *Decouche v. Savetier*, 3 Johns. Ch., 216; and *Coster v. Murray*, 5 ib., 522; *Baker v. Root*, 4 McLean, 572; *Lyon v. Maclay*, 1 Watts., 275; *Willis, Trust.*, \*210, and cases cited; *Finney v. Cochran*, 1 Watts and S., 112; *Angell Limit.*, 176, 177, 178; *Poe v. Foster*, 4 Watts. & S., 351; *Murray v. Coster*, 20 Johns., 575, 584-5, a bill for an account; *Young v. Mackall*, 3 Johns. Md. Ch. R., 398, 407-8; *Zacharias v. Zacharias*, 11 Harris, Pa., 452, 455-6, a strong case.

*E. W. F. Sloan* for Respondent.

So far as the mortgagee holds the legal estate in the land pledged for the payment of the debts due to him, he is, strictly speaking, not a trustee. But if he goes into possession of the estate before the maturity of the debt, then so far as he is accountable to the mortgagor for the rents and profits; or for the return of the property after these shall have discharged the whole debt; or for the payment of the overplus, in case of a sale by him under a power, he is, to all intents and purposes, a trustee for the mortgagor, and is so uniformly held to be. Hence, a mortgagee in possession before a decree of foreclosure and sale, is denomi-

nated a trustee. *Fenwich v. Macy*, 1 Dana, 280; *Holridge v. Gillespie*, 2 J. Ch. R., 33; 2 Story Eq., §§ 1016, 6016, a.

"The mortgagee, in possession, holds the estate with duties and obligations analogous, in some respects, to those of a trustee." "He can make no gain or profit out of the estate, which he holds merely for his indemnity." 4 Kent, 167.

But, it is insisted in argument, on the part of the appellant, that the assignee of a mortgage has a right to demand and receive the whole amount from the mortgagor, no matter what he may have paid for the assignment, and though he may have paid nothing. As a general abstract proposition of law, that is not questioned. If, on the seventh of March, 1850, Starkey stood entirely free and clear of any fiduciary relation to Gunter, in the purchase of the mortgage from Wells & Co.; and if that was an independent transaction, having no connection with the conveyance in trust, on the ninth of the same month, his right to foreclose the mortgage so assigned, for the full amount of the demand, would not now be questioned.

That was the character of the case, considered by the Supreme Court of the United States under the second point, in *Prevost v. Gratz*, 6 Wheat., 487.

The rule of law here contended for by respondent, was clearly expressed by Mr. J. Washington, in the following language: "I admit the soundness of the doctrine laid down by the complainant's counsel, that if a trustee, executor, or agent, buy in debts due by his *cestui que trust*, testator, or principal, for less than their nominal amount, the benefit gained thereby belongs, not to him, but to the person for whom he acted. A Court of Equity will not permit a person acting as a trustee, to create in himself an interest opposite to that of his *cestui que trust*, or principal. But this doctrine is inapplicable to the case of a *bona fide* creditor, who became so, prior to the assumption of his fiduciary character."

It is obvious, that the substitution of the promissory notes of Starkey for the notes and mortgage held by Wells & Co. against Gunter, and the conveyance, by the latter to Starkey, of his whole estate in trust, were but parts of one entire transaction, commencing on the seventh and ending on the ninth of March, 1850; that, in purchasing, from Wells & Co. the notes and mortgage of Gunter and ostensibly becoming his creditor in their stead, Starkey acted alone as agent for Gunter, pursuant to a mutual understanding between all the parties concerned, in anticipation of and to prepare the way for the conveyance in trust.

Gunter was indebted to Wells & Co. upon notes and mortgage in the sum of \$41,856, principal and interest included. He was engaged in the erection of a valuable building upon the property mortgaged, with the certain prospect of letting the same at a

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high rental. He was in want of some means to enable him to complete it.

Under these circumstances the arrangement in question took place. What that arrangement really was can hardly admit of a doubt.

*Lees v. Nutall*, 1 Rus. & Myl., 53; *Taylor v. Salmon*, 4 Myl. & Craig, 158; *Green v. Winter*, 1 J. Ch. R., 27. Also, in *Hamilton v. Wright*, 9 Clark and Fin., 110, recently decided in the House of Lords; where the rule itself and the principles upon which it is founded are presented with great clearness and force by Lord Brougham.

In a case like this no circumstance can exist to raise a presumption of the extinguishment of the trust, until there has been a sale of the trust property under the power by the trustee; or some open denial or repudiation of the trust is brought home to the knowledge of the party in interest, which requires him to act as upon an asserted adverse title. 3 Sum., 487.

The special Probate Statute can have no application to the claim of respondent. It is not true that Barber was sued as administrator. He is described as administrator *de bonis non* of J. J. Starkey, deceased; because his appointment as such made him the trustee by the terms of the deed. The conveyance was to Starkey, his executors, administrators, etc. By virtue, therefore, of his appointment, and by the terms of the deed, he became trustee instead of the deceased.

And it was in his character as trustee that he was sued. No presentation, therefore, of the claim to him as administrator, or to his predecessor as executor, was required by the statute. The statute was never intended to apply to any cases of trusts, or trust property in the hands of executors or administrators, but simply to property belonging to them as assets of the testator or intestate. *Treothick v. Austin*, 4 Mason, 29. *The People v. Houghtaling*, 7 Cal. R., 348.

As a legal proposition, the commencement of Starkey's fiduciary character did not necessarily depend upon the execution of the trust deed. For if, upon the mere verbal request of Gunter, he undertook to act as his agent in the purchase of the mortgage from Wells & Co., he could not claim the benefit of it.

The rule on this point is thus expressed: "If a trustee should purchase a lien or mortgage on a trust estate at a discount, he would not be allowed to avail himself of the difference; but the purchase would be held a trust for the benefit of the *cestui que trust*." 2 Story's Eq., § 1211.

"The same principle will apply to persons standing in other fiduciary relations to each other. Thus, for an example, if an agent who is employed to purchase for another, purchases in his own name or on his own account, he will be held to be a trustee

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for the principal, at the option of the other." 2 Story's Equity, § 1211, *a*.

The funds which constituted the subject of litigation in this case, were not assets in Barber's hands, subject to the general demand of creditors or distribution. They were created for and devoted to a given purpose, either fully or imperfectly expressed. And that object having failed, a trust by operation of law necessarily resulted to the party who made the conveyance.

What is the rule as between *cestui que trust* or principal, and the trustee or agent, when the latter improperly mingles the trust funds with his own so as to render them undistinguishable?

"It is the duty of the agent to keep the property of his principal separate from his own, and not to mix it with the latter; and if he does not keep it separate from his own, in cases where it is properly his duty, and afterwards he is unable to distinguish them, the one from the other, the whole will, as a sort of penalty for his negligence, be adjudged to belong to his principal." Story on Agency, § 205; Paley on Agency, 48; Hart v. Ten Byck, 2 John. Ch. R., 108; 1 Story's Equity, § 468.

See, also, Story on Bail., § 40; and the case of Lupton v. White, 15 Ves., pp. 432, 436, 439; Docker v. Somes, 2 Mylne & Keen, 635.

*Messrs. Casserly and Lake*, counsel for Appellant, filed an elaborate brief in reply to the argument of Mr. Sloan.

*Mr. J. A. McDougall*, for Respondent, also filed a brief in support of the ground taken by Mr. Sloan.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The main conceded facts of this case constitute an authentic chapter in the business history of the early days of California. Nothing could more clearly show the excessive confidence and the delusive anticipations of that period.

The first and main question in the case is one of fact—of intention. Was Starkey, in the purchase of the note and mortgage of Gunter to Wells, the mere agent or trustee of Gunter? or did he act for himself and for his own interest? This is the question upon which the decision must rest.

To ascertain the intention of the parties we must consider the then existing circumstances. In other words, we must judge the past by the circumstances existing in the past.

At the time the transaction had its beginning the parties did not anticipate any of the changes in the state of business which afterwards took place. They anticipated no decline in the price of property, or in the rate of rents. The income and value of the property was not expected to become less. All the features

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of the transaction show this. Starkey was then considered a wealthy man; and there is nothing in the record to show that he intended to commit any fraud, either upon Gunter or Wells. The value of the mortgaged property at that time was estimated at from one hundred to one hundred and fifty thousand dollars; and the monthly income from the mortgaged premises exceeded the interest upon both mortgages. It was not expected that the money to be advanced by Starkey would long remain unpaid. This is evident from the terms of the instrument and the admitted facts. The interest upon the mortgage to Wells was the only burthen expected to be *continuing* for any considerable time. Whether the interest upon the notes to Dohrman was to be paid monthly does not certainly appear; but that such was the fact seems plainly inferable from the testimony of Wells. The witness states that Starkey paid to him \$1,660 about the first of June, 1850. This payment must have been for interest, as no part of the principal was then due. When the notes to Dohrman were executed they were no doubt ante-dated, so as to be complete substitutes for the notes of Starkey to Wells.

As the plaintiff alleged an express trust, it was incumbent upon him to prove it, *as alleged*. From the nature of the case, it could only be an express trust. But conceding this to be true, this express trust may be proved by circumstances. And the plaintiff's counsel insist that the facts proved, taken together, do establish this express trust.

There is nothing in the *language* of the instrument under date of March 9, 1850, that goes either to establish or rebut the allegation that Starkey was the trustee of Gunter, in the arrangement with Wells. The terms of the instrument are expressly confined to the advances *thereafter* to be made by Starkey. Not a word is said about any other transaction. The language of the instrument is very clear, showing that it was drawn by a competent professional man. We must, then, look to other proofs to sustain the alleged trust.

It is insisted by the learned counsel for the defendant, that the alleged trust is "so unprecedented in its character as, of itself, to excite suspicion and demand scrutiny."

Viewing the transaction by the light of subsequent experience, and it must be conceded as extraordinary, in the contemplation of either theory. That Starkey incurred a liability of some \$97,000, which he bound himself to meet in thirteen months, is *certain*. Regarding the transaction of Starkey with Wells as intended for a speculation, on the part of Starkey, it is difficult to see any *adequate* motive for it.

The interest that Gunter was paying upon the purchased note and mortgage was ample; and, regarding the security as sufficient, there was still no adequate inducement for Starkey to make the arrangement for his own benefit; for the reason, that

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he had no money to pay for the debt, but gave his notes upon *long* time, and drawing the *same* rate of interest. What could he expect to make by the transaction? The interest he received from Gunter he was bound to pay to Wells. The very fact that Starkey paid no money for the debt, and gave his own notes for the *whole* amount, drawing the same interest, and payable thirteen months after date, is one of the strongest proofs to support the theory that he lent his friend Gunter his *credit*, for the purpose of ultimately saving a property then valuable and productive. Had Starkey purchased the debt for his own benefit, with the intention of paying for it out of his own means, then he would never have given his notes drawing so heavy an interest, and for so long a time. Conceding that Starkey was honest, there could be no sufficient inducement for him to make the purchase, as a business transaction. But if we concede that he then anticipated his future failure, which occurred in January, 1852, and just before his death, and that his object was to obtain possession of the rents falling due before his own notes became payable, with the fraudulent intent never to pay the notes he gave to Wells, then we can see how he could expect to gain something by the arrangement. His notes to Wells being due *thirteen months after* date, and the rents coming in *monthly*, had such fraudulent purpose been contemplated, it was in his power to have collected a large sum without paying out anything, except the advances agreed to be paid to Gunter. This harsh theory, however, is not supported by the record, and not insisted upon by the counsel on either side.

The risk of loss was the same to Starkey, whether he acted in one character or in the other. His liabilities were the same, and his means of indemnity the same in both. From the nature of the arrangement, there could be little or no prospect of gain to him. At the time the arrangement was made, Starkey must have supposed that the rents of the property and its value would not decline; that the incoming rents, though not equal to the principal and accruing interest upon his notes to Wells, would at least pay all the interest and a large portion of the principal within the thirteen months, and that the property would be amply sufficient to pay the remainder of the principal, should Wells insist upon prompt payment. Starkey held the assigned note and mortgage, and could at any time enforce payment when compelled to pay himself. It is most probable that he anticipated making a further loan, if required. Upon the hypothesis that the rents would exceed the interest, and pay a part of the principal, leaving thereafter less interest to pay, while the rents remained *as before*, Gunter, no doubt, based his hopes of ultimate relief. It was this view of the matter that led to the arrangement between Starkey and Gunter.

This view is supported by all the acts of Starkey. From a

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written account, signed "J. J. Starkey, Trustee," and rendered September 23, 1851, it appears that all the advances by Starkey to Gunter, amounting to \$11,940, were made before the seventh of May, 1850, and that by the first of June, 1850, he had received the sum of \$19,100. After this time, namely, the sixth day of October, 1851, he executed a written instrument of compromise with Laffan and others, which he signed "J. J. Starkey, trustee of Henry Gunter." He also receipted in the same manner for moneys paid to him by different persons on the twenty-third of October, 1851.

But there is one circumstance that seems to be inexplicable upon any other theory than the one which supposes Starkey to have acted for Gunter in making the arrangement with Wells. In the account rendered September 23, 1851, Starkey charges Gunter with this item: "1850, April 7. To p. n. given to T. J. Wells, amount of mortgage, \$41,856."

It seems clear, from all the testimony, that the note and mortgage of Gunter to Wells, amounted, *including* principal and interest, at the time of the assignment to Starkey, to the sum of \$41,856. For this sum Starkey gave his notes, and charges Gunter, not with the principal of Gunter's note and mortgage, but with the amount of Starkey's notes to Wells. In this account a balance is struck, "*exclusive of interest*," showing that Starkey only intended to charge Gunter with the principal, not including the interest. If, then, Starkey had purchased the note and mortgage upon his own account, he should have charged Gunter with the amount of his note to Wells, "*exclusive of interest*." But upon the theory that Gunter was only to pay him what he was to pay, the account, as rendered, was correct.

Besides these circumstances, it is stated by Wells, that the transfer of Gunter's note and mortgage was made at the instance and request of Gunter. In the language of the witness, "the plaintiff made the whole transaction with my assent," "the said assignments were made by direction of Mr. Gunter."

There are circumstances referred to by the learned counsel for the defendant, tending to rebut the evidence for the plaintiff. But we think they are not sufficiently strong to overcome the proofs on the part of Gunter. The fact that Starkey continued to act as trustee long after the advances made by him to Gunter had been fully paid, is certainly very difficult to account for, except upon the theory of the plaintiff.

It is true that the conditions of the trust should have been reduced to writing, and we might naturally expect to find them in the article of March 9, 1850. But this omission can be accounted for upon the ground of the great confidence Gunter reposed in Starkey. So far as Starkey was concerned, it made but little, if any, practical difference to him whether the conditions of the trust were reduced to writing, or not. He had

the assignment of the note and mortgage, and was as safe in that position as in any other. Gunter, on his part, was not in a situation to make strict terms, and was compelled to place confidence in Starkey's good faith. It is evident, from all the circumstances, that Gunter was not an accurate business man; but that he was careless, rash, and confiding. He wished to pay his debts, and at the same time save his property. His business was complex and confused; and he seems to have plunged into everything that offered any prospect of success, however small.

It is urged by the counsel of defendant, that there is a vital distinction between a mortgagee and a trustee. But, conceding that there is some difference between a trustee who is no creditor, and a trustee who is, we can not perceive how it can affect the merits of this case. An ordinary trustee is a person who sustains but *one* character, and has no lien upon the trust funds, except for his compensation; while a mortgagee, let into the possession of the mortgaged property, is both a creditor and a trustee. So far, however, as regards his capacity of trustee, he is just as strictly bound as an ordinary trustee. Starkey was compelled to act with strict fidelity, and could not be allowed to manage the property exclusively for his own benefit, and to the injury of Gunter. The mortgagee, who is also a trustee, is as strictly bound to fulfill his trust faithfully, as he would be were he not a creditor, but acting for the benefit of another *cestui que trust*.

Another point urged by the counsel of the defendant is, that Gunter did not present his account to the administrator for approval or rejection, as the Probate Act requires. But to this, it is a sufficient answer that the scope and purpose of the bill of Gunter was not the recovery of a *debt* against the estate, but to enforce his right to trust funds that had found their way into the hands of the administrator. He was compelled, from the complex nature of the case, and the kind of relief sought, to go into a Court of Equity. The trust funds properly constituted no part of the assets of the estate. Where the executor or administrator has property which belongs to another, the owner is not required to present his account, as if he were a creditor. The claimant of specific *property*, and not of a *debt*, can not properly be called a *creditor*, within the meaning of the Probate Law. The facts of this case are substantially the same as those of the *People v. Houghtailing*, (7 Cal. R., 348.)

There are several other points, made by the counsel for the defendant, that we do not consider of material importance. Upon the whole, we think substantial justice was done by the decision of the Chancellor. The referee seems to have given the case a very patient investigation, and his report appears to be substantially correct.

The judgment of the Court below is affirmed.

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Gunter v. Jones.

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BURNETT, J., on petition for a re-hearing :

In the former opinion delivered in this case, we passed over one point, simply deciding it without giving our reasons for the decision, except by a reference to the case of the People v. Hough-tailing, (7 Cal. Rep., 348.) The defendant, in an able and elaborate petition for a re-hearing, again insists, with renewed earnestness, upon this point as being conclusive in favor of the defendant. The importance of the principle involved, and of the case to the parties, induce us to state more at length the reasons that led us to the conclusion heretofore announced.

The proposition is substantially this: that, conceding Starkey to have been a trustee, and to have received trust funds belonging to Gunter—the trust money having been mingled by the trustee with his individual property—there was no distinct trust fund in the hands of the administrator that could be identified as such; that the consequence of this confusion of trust with private moneys was, that Starkey ceased to be a trustee, and thus became a simple debtor of Gunter; and that, as Gunter did not present his claim for this debt to the administrator, within the statutory time, the same was for ever barred. This being purely a technical ground, and one that would work great injustice in this particular case, should be clearly sustained by both reason and authority; otherwise we must reject it.

It is difficult to perceive how, in sound logic or in simple justice, a trustee, by his own voluntary act, may change his capacity, and convert himself into a mere debtor. In cases of express trust, the capacity of the trustee and that of the *cestui que trust* are created by contract; and all the legal rights and duties, belonging to the one or the other, are but the legitimate results contemplated by the contract itself, and flow from the capacity of each party thus created by the concurrence of the two wills. The same power, and only the same that creates, can destroy. As it requires two or more to make a contract, it requires the same to cancel or change it. The contract is the joint creation of both the parties. It being the result of their concurring wills, can not be dissolved or changed by the single act of one.

If, then, in the theory of the law of contracts, the capacity of the parties can not be changed except by the mutual consent of both, the incidents attached to that capacity must remain, and the rights and duties of each should continue the same. The act of either, without the consent of the other, should never be allowed to change the relation or capacity of the parties. The *cestui que trust* has no right to make a trespasser or debtor of the trustee, without his consent. If the trustee does a wrongful act, then he, by the act, consents that he may be treated as a debtor or trespasser, at the election of the *cestui que trust*. Either party, by consent, express or implied, may place it in the power of the other to change the relation.

From the just and legitimate application of these principles, it follows that the trustee should never be permitted to defeat the rights of *cestui que trust*, so long as it is possible for a Court of Equity to enforce them. No mere technical obstacles, not founded in a rule of general practical utility, should be permitted to defeat the ends of justice in such cases.

We can not perceive, upon considerations of principle or utility, why the mingling of trust with private moneys, by the voluntary act of the trustee, should destroy the trust fund, and change the remedy or right of the beneficiary. It is true, money has no ear-marks; and, for that very reason, the mingling of trust with private funds can injure no one. The value being the same, and it being matter of the most perfect indifference whether parties get the same or other coin, so they get the sum to which each is entitled, there can result no injury to either. Common sense will not discuss the question of identity, when nothing useful can result from its determination.

"If one man," says Lord Eldon, (15 Ves., Jr., 442,) "mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party can not tell what was the value of his property, he must have the whole." The same principle was held by Chancellor Kent, (2 John. Ch. R., 108,) and approved by Mr. Justice Story. (Story on Bail, 840.)

But it will be observed, that when articles of different values are mixed, producing a third value, the innocent party is only allowed to take the whole in case he cannot tell the original value of his property. Even in case of such a mixture, if the original value of the property mixed can be ascertained, the party can only claim that value, except the mixture be willfully made, with intent to injure, or from gross negligence.

We have been cited by defendant's counsel to several cases, as authority to sustain the position assumed. In the case of *Whitcomb v. Jacob*, (1 Salk., 161,) it was held, that where one employs a factor to dispose of merchandise, and the factor sells the goods and has the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor. So, in the case of *Scott v. Surman*, (Willes, 400,) it was held, that the money received by the factor went into the hands of the commissioners in bankruptcy, and that the consignor could only come in under the commission. In the case of *Hart v. Bulkley*, (2 Ed. Ch. R., 70,) it was held, by Vice-Chancellor McCoun, that where a co-trustee mingles the trust funds with his individual moneys, and dies, the surviving trustee can not follow the fund into the hands of the administrator, but must come in with the creditors of the intestate.

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But these cases are clearly distinguishable from the case before us. There the rights of creditors were involved, while here the contest is solely between the *cestui que trust* and the administrator of the trustee. No rights of creditors are involved, but only the interest of the heir. In the case of *Hart v. Bulkley*, the administrator expressly set up the fact that the estate was insolvent, and only able to pay a portion of the debts.

In the case of *Lupton v. White*, (15 Ves., Jr., 482,) and *Hart v. Ten Eyck*, (2 John. Ch. R., 108,) it was held that, where an agent confounds his principal's property with his own, it devolves upon the agent to distinguish his own portion, otherwise the principal may take the whole. In those cases, the rights of creditors were not concerned, and the question was between the principal and agent.

But the case of *Docker v. Somes*, (2 Mylne & Keene, 655,) is a case directly in point, and sustains the view we have taken. In that case, it was held that when a trustee mixes trust funds with his private moneys, and employs both in trade as his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds employed. The opinion of the Lord Chancellor is distinguished for its clearness, justice, and force. The authorities are reviewed and some of them questioned.

The former rule had been, to require the trustee, who mingled the trust with his private funds, to pay only legal interest upon the amount; and this, without any regard to what he had in fact made by the speculation. If he had not mingled the trust funds, but had made a speculation, then the *cestui que trust* had the right, also, to the gains. But, under the former rule, justice and expediency had been sacrificed to convenience. And it is to be regretted that too many of the rules of law were originally adopted from motives of convenience, and are still followed from the same motives, and from the hesitation Judges feel in disturbing former decisions.

It can not be well seen why a trustee, who wrongfully mingles the trust funds with his private moneys, should be in a better condition than the one who keeps them separate. "What avails it," asks the Lord Chancellor, "towards preventing such malversations, that the contrivers of sordid injustice feel the power of the Court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores?" "When did any wrong-doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had continued to throw in the way of pursuit and detection, saying, 'You had better not make the attempt, for you will find I have made the search very troublesome?' The answer is, 'The Court will try.'"

If the theory of the defendant be true, neither Starkey nor his

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administrator could be charged anything more than legal interest, however great the actual gains may have been. Such a rule gives the trustee, at his own election, the power to borrow at the lowest rate of interest. It rewards him for his own wrong, and holds out to him a continual temptation. The rule, instead of imposing restraints, absolutely offers a bribe to the faithless trustee. It reverses every principle of equity and justice, and bestows rewards where punishment is deserved.

And if the Court, in that case, could follow out and distinguish the proper proportion of the gains, though mixed with the mass, it would seem equally competent to follow and distinguish the proper proportion of the capital, though mixed with the mass. The mixing by the trustee will not be allowed to defeat the efforts of the Court in either case.

We must adhere to our former decision.

## LAFFAN v. NAGLEE.

A covenant in a lease to the lessee, "his heirs and assigns," for a term of eight years, that if the lessor shall sell or dispose of the demised premises the lessee is to be entitled to the refusal of the same, is a covenant running with the land.

Every covenant in the lease relating to the *thing demised*, attaches to the land, and runs with it.

The valuable privilege of pre-emption attaches to the entire property, and is therefore assignable.

A and B entered into an agreement in which it was stipulated that A should advance \$12,000 for the purpose of putting up a brick house on property of B, held by lease, and B was to convey to A one-half interest in the leased premises; the balance of the costs of the building was to be borne in equal proportion. When completed, B was to rent the same, and pay over to A one-half of the rents. Building was erected at a cost of \$48,000—\$30,000 paid by A, and \$18,000 by B,—B conveyed one-half of premises to A: *Held*, that A and B were copartners.

And where one of two holders of the leasehold, holding in partnership, purchases the fee in his own name and with his own money, it enures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase-money.

And as the relation sustained by the tenant purchasing the fee, to his co-tenant or partner, is one of confidence, the proof that the latter had waived his right must be clear, and the burden of proof rests upon the tenant purchasing.

APPEAL from the Superior Court of the City of San Francisco.

On the ninth of April, 1847, Susannah Hinkley leased to Ward and Smith certain premises in San Francisco, for a term of eight years from date, at a rate of \$300 per annum. The last clause of the lease is as follows:

"The said Susannah Hinkley doth furthermore agree to permit the said Frank Ward and William M. Smith to make and complete any and every addition and improvement they may

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think fit; all of which said additions and improvements are to be attached to said premises; provided, the said Susannah Hinkley pays a reasonable and assessed value for the same; and, furthermore, if the said Susannah Hinkley shall sell or dispose of the aforementioned premises and lot of ground, the aforesaid parties, Frank Ward and Smith, are to be entitled to the refusal of the same."

On the tenth of September, 1849, Smith assigned all his interest to Ward, and on the sixth of February, 1850, Ward assigned to Naglee. On the twenty-ninth of April, 1851, Laffan and Naglee entered into a written agreement, in which it was stipulated that Laffan should advance \$12,000, for the purpose of putting up a brick building, according to specifications thereto attached, on a lot eighty feet eight inches long, on Merchant street, by forty feet deep, the same being a portion of the leased premises. The building was to be commenced at once, and finished in seventy days; and the twelve thousand dollars were to be paid to the contractor by Laffan, as the work progressed. In consideration of which payment, Naglee undertook to convey to said Laffan one-half interest in the lot and improvements. It was also agreed that the balance of the cost of the building should be borne in equal proportion; and, when completed, Naglee was to rent the rooms, and pay over one-half the rents to Laffan, deducting therefrom fifty dollars per month ground-rent, and one-half of all necessary and proper expenditures about the management and repair of the building. On the twentieth of June, 1851, both parties having previously complied with the agreement, by erecting a building at a cost of some \$48,000, \$30,000 of which were paid by Laffan, and \$18,000 by Naglee; the latter executed to the former a deed of assignment of the lot mentioned in the agreement. The words of the assignment are of "an undivided half of all the estate, right, title, and interest which I have in and to a certain parcel of land, (describing it,) with the like undivided half-interest in all the buildings and improvements thereon, and in the lease under which I hold the said premises; the said lot or parcel of land being part of the premises held by me under a lease made by Mrs. Susannah Hinkley;" "it being understood and agreed, however, as a condition of this contract, that the said Laffan is to be accountable to me for one-half of the ground-rent of \$100 per month, to which said lot is subject; and that I am to have the management of the buildings on said lot, to rent the rooms, receive the rents, and pay over the one-half to said Laffan, deducting his proportion of the ground-rent aforesaid, and the half of all necessary and proper expenditures about the management of the buildings, and keeping them in repair." On the fifteenth of October, 1851, a purchase of the fee in the entire lot, as described in the lease of Mrs. Hinkley, was negotiated by Mr. Bolton, of the firm of Bolton,

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Barron & Co., at the request of Naglee, and for his benefit. A deed was made by William M. Smith and wife, (formerly Mrs. Hinkley,) of the premises, to Bolton, for the consideration of \$17,000, who on the same day conveyed all the premises back to Naglee, except a strip forming Merchant street. On the same day Naglee executed to Bolton a mortgage upon the property conveyed by Bolton to him, for the purpose of securing a loan of \$30,000, payable in one year, and drawing interest at the rate of two per cent. per month from date. The \$17,000, the price of the property, was paid out of this loan.

The bill in this case was filed by Laffan for a settlement of the joint transactions, and to compel the defendant to convey to him one undivided half of the lot embraced in the assignment of Naglee to Laffan. The plaintiff obtained a decree in the Court below, and the defendant appealed.

*Jo. G. Baldwin and Delos Lake for Appellants.*

1. By the terms of the assignment and contract between Naglee and Laffan, was the right of purchase of the fee of the property transferred to Laffan: *i. e.*, had Laffan an equal right with Naglee to make this purchase?

2. If this is so, then does the mere fact of the purchase by Naglee of the fee, give to Laffan the benefit of the purchase; or was Laffan bound to take any steps, and, if so, what, to entitle him to the benefits of this purchase or the right under the contract? and, as connected with this point:

3. Has Laffan shown that he has done what was incumbent upon him, in order to realize the advantages of his position?

4. Do the facts show that he has waived his right, whatever it was?

Several other propositions arise in the case, but they range themselves under the foregoing, and will be stated and illustrated in the sequel.

It is to be kept in mind that this was not a purchase, by a trustee, of the property of the *cestui que trust*. It is only pretended to be the case of a purchase by one, when both of two tenants-in-common had the right to purchase. There was no obligation on both or either to purchase. There was no obligation on the part of the original lessor to sell: nor, if she chose to sell, any price limited or fixed. Such a privilege was a mere possibility—it was an intangible, unenforceable obligation—it was, for any practical purpose, valueless. It could not have entered into the minds of the parties in making this arrangement under the lease, and it would not, therefore, raise the presumption which Judge Shattuck supposes, that the contract was made in reference to it.

We approach, therefore, the construction of the words of the

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assignment, with this view of the right pretended to be assigned.

Naglee, on the 20th of June, 1851, assigns to Laffan "one undivided half of all the estate, right, title and interest, which I have in, etc., to a certain lot or parcel of land in the said city of San Francisco, etc., with the like undivided half-interest in all the buildings and improvements thereon, and in the lease under which I hold the said premises," etc.

The assignment from the Wards to Naglee, "sets over the said indenture of lease, and the estate thereby granted, together with all the buildings and improvements which have, since the date," etc.

This "right of refusal" is not mentioned in Naglee's deed to Laffan, nor is their any assignment of that right. The refusal is not "estate, right, title or interest in a lot," nor is it a half-interest in a lease. How could half of a refusal, given to several jointly, be divided? If "half" could be assigned, how much further could it be subdivided? Into how many parts? and what would be the assignable value of a twelfth in a "refusal."

We contend :

1. That this pre-emptive right was a personal privilege to the first lessee—that it was not made assignable by the terms of the lease to Smith & Ward—that it was not assigned, by the deed of Ward, to Naglee—that it is a chose not assignable at law or in equity. What was the right? It is called a refusal—the meaning is this: "If lessor chooses, at any time hereafter, to sell, and should offer the property for sale on such terms as she may choose, lessee may have the liberty of buying it, in preference to any one else." This clause in the paper is no better for being in a contract of lease, than if it were anywhere else. It has no necessary connection with the lease, or with the relation of landlord and tenant. Now, though the Courts have gone a great length in upholding the assignment of interests, yet, we submit, they have never gone so far as to uphold the assignment of any thing less than an interest—a mere possibility of—a mere remote chance for a bargain. See 6 Greenleaf, 200, 83; 8 Cowen, 206; 2 Gill. & J., 173; 1 Peters, 193; 12 Wend., 297; 3 Lit., 41; Preston on Titles, 75-6.

The test of the assignability of an interest is said to be, whether it would descend. Here the lease is a chattel interest, and goes to the administrator. It can hardly be supposed that this thing would go as assets to the administrator, nor would it go to the heir. In truth, from its very nature, it could not go anywhere, as it could not be enforced, and the lessor could evade by not selling, or by fixing an arbitrary price or impossible terms; and besides, no mutual obligation existing, it was not a bargain, or a right, or founded on any sufficient consideration.

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In order to settle this question, we must first see in what relation these parties stood, one to the other. They were not partners; they were tenants-in-common of a limited leasehold estate; their interests being the same though the titles accrued at different periods; that they built this property to be rented, and meant to divide the profits, is nothing unusual in cases of tenancy-in-common, and does not alter the tenure. The question, then, in its simplest form, is this: Can one of two joint lessees buy in the reversion, without giving the other the benefit of the purchase?

If these lessees had become such, upon the promise or agreement to continue their relations towards each other, as to the property, there might be some ground for this doctrine; but here there is nothing of this sort. Here, the joint business—the leasehold—was connected with the premises, and ceased when the lease expired. Neither partner had any rights after the termination of the lease, nor any associated interests, beyond finding the value of the buildings; which could have been settled as well between the partners as between them and a stranger. The rule is, that partners can not, by dealing with the firm affairs, get a selfish advantage. All the advantages of the contracts, or property, or dealings with the firm buildings can not be purchased or renewed by one at the expense of the rest; for the value of the renewal comes from the use made of the buildings as the place of business of the firm. To get the renewal would be giving one partner really the advantage of the old place of business, to which custom had come from the joint service, skill, etc. But no such principle applies to a case where the lease is held by two, with no other connection than the joint use of the leasehold estate; with no interest in the reversion, and with no peculiar right to acquire it.

It has been held, that when a man has made a bargain, and ascertains he has been defrauded, he must immediately give notice of the fraud, and offer to redeem the property, in order to enable him to resist the contract.

It should seem that the same rule ought to hold when there is a mere right of election to make a bargain. He must exercise the election immediately, or within a reasonable time, after he is called on to exercise it. He can not lie by—see the experiment made as to the speculation—advance no money—take no risk—share no responsibility—and then divide profits; still less—and then pay his part out of the profits; and yet less, get a premium for taking the property!

Another view may be taken of this question: We have shown that this is not a case of trustee or agent buying the property of the principal. It is only, at most, the case of one man buying when both had the same right to buy. But as Laffan's right was at most a mere privilege of purchase, Laffan must show, as

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it was merely optional with him to buy or not, that he was at this time both willing to buy and able to buy upon the terms of the purchase. If we have shown that Naglee was not bound to wait, and Mrs. Hinkley was not bound to wait on Laffan's convenience, then Laffan must show his willingness and ability to make the purchase when the sale was to be made. He must have been ready when they were. It is evident that he lost nothing in losing a privilege which he did not intend, or was not able to avail himself of. If we concede that when Naglee bought, Laffan's right to come in was not divested, still the right was only the right to come in on the same terms with Naglee, and he must have been ready and must have tendered a compliance with those terms on his part before he could get any advantage from the purchase.

Hitherto we have impliedly considered this case as if, in a lease of partners, one partner could not purchase in the reversion for his own benefit; and we sought to distinguish the case at bar, from others falling within the supposed principle. But our concession, even thus limited, was too liberal. This is not the law even in respect to partners, leasing as such, and occupying for the benefit of the firm, the leased premises. The rule is limited to cases of leases, in which one partner procured the renewal of a lease of property, formerly leased and used by the partnership. But it has no application to cases of purchase of the reversion or fee. The rule is stated in *Anderson v. Lemon*, 4 Selden's R., 237.

*Randall v. Russell*, 3 Merrivale's R., 190, testator bequeathed leasehold estate to his wife; she afterwards renewed the lease, and then she purchased in the reversion. The bill was filed by the heirs to hold her as trustee for the renewed lease and also for the fee. That part of the bill to hold her as trustee was dismissed.

In a note to 7 Vesey, Jr., *Moody v. Matthews*, p. 185, note 1, the doctrine on this subject is reviewed. See note 2, p. 186. See *Hardman v. Johnson*, 3 Merivale, 352.

Now, upon what right does Laffan stand? Not as a *cestui que trust*—for, according to these cases, there was no estate upon which a trust could rest. He had no interest in the fee. Not again upon a resulting trust, for Naglee purchased with his own money—not Laffan's. Not upon a trust created by writing, for there was none. The doctrine of leases between partners does not apply, for that rests on the idea that a renewal is but the continuance of the estate first created—i. e., of the former lease; but the sale never took effect until the termination of this lease, and it creates a new title, and there was no partnership here.

Even in the case of a purchase of trust property by a trustee, or by an attorney or agent in his own name, instead of his principal's (to which case the respondent's counsel have sought to

likened this case) it has always been held that it was competent for the *cestui que trust* or principal to ratify the act and so be estopped from questioning the validity of the purchase.

In the case of *Campbell v. Walker*, (5 Vesey, 678,) the Court say that "any trustee, purchasing the trust property, is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say he is not satisfied with it." \* \* "The trustee purchases subject to that equity; that if the *cestuis que trust* come in a reasonable time they may call to have the estate resold."

To the same effect is the case of *Morse v. Royal*, 12 Vesey, 374. So, in *Prevost v. Gratz*, Peters C. C. R., p. 368.

*Hoge & Wilson* for Respondent.

The appellant claims to be entitled to one-half of the fee of the tract of land of which he and the respondent held the leasehold, on two distinct grounds:

1. By reason of the terms and provisions of the original lease and various assignments referred to.

2. Because of the partnership, and other peculiar and confidential relations existing between the appellant and respondent.

Is there any rule or principle of law that saps the foundation of all these various business transactions, based on the pre-emption clause of the lease? It is a covenant in the lease—part of a solemn legal instrument, of as much validity as any covenant in a valid agreement to do or not to do a particular thing. This "right of refusal"—this pre-emption right, is frequently to be found in all kinds of legal instruments; sometimes in a deed conveying the fee, as in the case of *Jackson v. Schultz*, 18 Johns. R., 184. This was a conveyance of a fee-simple, subject to be defeated upon a condition subsequent. One of the conditions was, as stated by the Court, that if he was minded to sell, he should first offer the premises to the grantor, etc. Sometimes it is found in a mortgage, as in the cases cited in 1 Powell on Mortgages, 125 -6, and in the text; sometimes in leases, as in *Jackson v. Groat*, 7 Cow., 286, and in the cases there cited. In fact, a covenant of renewal of the term of a lease, on its expiration, is a substantial pre-emption right, so far as the leasehold is concerned. In *Goodtitle v. Saville, et al.*, 16 East., 87, a pre-emption in growing timber thereafter to be cut was enforced. So, equity will enforce a will proposing a right of pre-emption. See 1 Sugden on Vend., 214, 6 Am., from 10th Lon. ed. In all these cases, and in all of these instruments, this right of pre-emption has been enforced, and determined to be a distinct, tangible, and valuable thing, for "practical purposes."

But it is said, and not very consistently with the first proposition (*i. e.*, that this right is "an intangible, unenforceable obligation,") "that this pre-emptive right was a personal privilege to

the first lessee," and was not assignable, and did not pass to the assignees of the lease; or, in other words, that it is a covenant that does not run with the land or leasehold. Here we must not permit the word "assigns" to deceive us; for some covenants pass with the estate whether the word "assigns" be used or not, and some estates will not carry the covenants though the word "assigns" be used. Covenants that run with the land do so independently of the mere language of the assignment, but collateral covenants do not pass under any words with the land.

This is made very clear in the case of *Vernon v. Smith*, 5 Barn. and Ald., 11.

But a pre-emptive right to an adjoining tract of land was held to be a collateral covenant, and therefore it would not pass to the assignee, though named. *Collison v. Letson*, 6 Taunt., 224.

A covenant of a renewal of the lease runs with the land, though executors or assignees are not named. The tenant's right of renewal is a part of his interest in the lease. *Winslow v. Tighe*, 2 Ball & Beatty, 195; *Rowe v. Chichester, Amb.*, 715.

In *Jackson ex dem. Livingston et al. v. Groat*, 7 Cow., 285, the very question under consideration was raised and determined. The validity of these covenants is fully established by the case of *Jackson ex dem. Lewis and wife v. Schultz*, 18 John., 174. The covenants extend to every alienation. See the language of Lord Ellenborough, C. J., in the case of *Roe ex dem. Bamford v. Hayley*, 12 East., 454.

The assignee of an assignee, as well of a reversion as of a term, have the same rights at common law as the first assignee. *Hornbridge v. Wilson*, 3 Per. & Dav., 641; 4 Per. & Dav., 120; S. C., 11 Ad. & El., 403; 3 Barn. & Ald., 346; 11 Ad. & El., 186; 8 Taunt., 715.

When a covenant relates to and is to operate on a thing in being, parcel of the demise, the thing to be done is annexed to the thing demised, and shall go with the land though the word "assigns" is not used. *Woodfall Land & Ten.*, 277-8. So, implied covenants, from the use of the word "demise," go to the assignee of the term. *Ibid.*, 284. As an assignee is bound by a covenant real which runs with the land, so shall he take advantage of it. *Ibid.*, 284.

But it is said that the pre-emption right can not be divided, and avail *Laffan* as mere assignee of part of the leasehold.

The general rules are that a covenant is divisible and follows the land, and that covenant will lie against an assignee of a part of the thing demised. *Woodfall's Land & Ten.*, 280. So, covenant may be brought by assignee of a part. *Ibid.*; *Van Horne v. Crain*, 1 Paige, 458.

Who can for one moment doubt that it was the fixed design of the parties to the foregoing instruments, to assign each time this pre-emptive right? After Naglee assigns all his estate and

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all his rights, and all the improvements, he goes on further to assign all his rights under the lease. There could be but one object, and that seems to have been accomplished. It was to give Laffan a perfect equality with himself in every respect, and to let him share in every favorable or unfavorable covenant.

Our conclusion is, that Laffan is entitled, by reason of the terms of the foregoing instruments, to a conveyance from Naglee of one-half the fee of the land, the leasehold of which was assigned to him by Naglee.

This brings us to the second branch of the question, that Laffan is entitled to a conveyance of one-half the fee :

2. Because of the partnership, and other peculiar and confidential relations, existing between the appellant and respondent.

This branch of the question throws out of view entirely the covenant of pre-emption, and is to be considered as if the proposition of the respondent's counsel were successfully maintained, to wit : that the pre-emptive right " was an intangible, unenforceable obligation, and for any practical purpose valueless."

They started out as co-tenants in the leasehold, and what is the end? Naglee has become the landlord of his own co-tenant. From a union of interest with him against a common landlord, he has become that landlord. He not only owns one-half of the improvements with Laffan, but claims to own the fee-simple, in his own sole right for his own sole use. His plain duty to Laffan is to aid him with his judgment, his sagacity, his management, and business capacity and experience, as co-tenant and co-owner in the buildings, in getting the highest price for the improvements from the landlord, or in buying the fee at as low a rate as possible. But his plain interest, now, is to get Laffan's share of the improvements as low as possible, or to sell him the fee at as high a price as possible.

Here is the very conflict that a Court of Equity does not permit to exist in one man—that is, duty against interest. Which would influence the appellant the most? Who would be sacrificed, Naglee or Laffan? *Thorpe et al. v. McCallum, et al.*, 1 Gilm., 626.

"A man can not be at once vendor and vendee. He can not represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as purchaser to buy as low as possible, and the law has wisely prohibited any person from assuming such dangerous and incompatible characters." *Wormsley v. Wormsley*, 8 Wheat. R., 421. See, also, opinion of Judge Johnson, p. 488 of S. C., 5 Cond. U. S. R.

"The principles of Courts of Equity will not permit that parties bound to each other by an express or implied contract, to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily gives them a direct interest adverse to that undertaking." Story on Part., §

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178; *Glassington v. Thwaites*, 1 Sim. & Stu., 124, 133; Coll. on Part., 185-6.

It does not matter how fair the transaction is. *Van Eppes v. Van Eppes*, 9 Paige, 241; *Hawley Cramer*, 4 Cow. R., 717; *Torrey v. Bk. of N. O.*, 9 Paige, 662; S. C., 6 Hill, 260; 4 Kent's Com., 483; 1 Story Eq. Jur., § 323; *Holeridge v. Gillespie*, 2 J. C. C., 33; *Fonblanque Eq.*, 477, and note.

The principles on this subject that apply between trustee and *cestui que trust*, apply as between partners. There may be a fraud and the party unable to show it. 1 Story Eq. Ju., §§ 322-3, pp. 318-19.

A trustee ought strictly to pursue the tenor of his way, without perverting it, directly or indirectly, to his own personal advantage. Collyer on Part., p. 170, § 182.

The learned counsel say "they were not partners." It is difficult to frame a definition of a copartnership, if Naglee and Laffan were not partners. Then, certainly, Chancellor Kent, Judge Story, and Mr. Collyer, and many others have failed in describing that relationship. They agree in saying that, "Partnership is a contract of two or more persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." 3 Kent's Com., 23; Story on Part., § 2; Coll. on Part., § 3; *Gilmore v. Black*, 2 Fair R., 489; *Jones, adm'r of Jones, v. Jones*, 1 Iredell Eq. R., 332; *Brownlee v. Allen*, 21 Mo. R., 123-7. See, also, *Carlisle, adm'r, v. Mulhorn et al.*, 19 ib., 58.

In *Barrett v. Swan*, 17 Me. R., 182-3, the defendants had entered into an association for the manufacture of paper. No stipulation was expressly made to share profit and loss, but it was held that this results as an incident to the prosecution of their joint business. Why this does not constitute a partnership, (says the Court) even between themselves, it may not be easy to perceive. See, also, to same point, *Doak v. Swan et al.*, 8 Greenl., 170.

The case of *Heirs of Ludlow v. Cooper's Devises*, 4 Ohio St. R., 2, shows a contract to buy land and improve it and share the profits, and though not near so strong a case as this, the Court held it to be a clear partnership. "So, where two persons took a building lease, and laid out money in erecting houses, they were held to be partners with respect to this property, and the survivor was held to be a trustee of a moiety for the representatives of the deceased." 3 Sugden on Vend., 166-7, and cases there cited; *Lyster v. Dolland*, 1 Ves. Jr., 431, etc. See, also, cases cited in note 2, 436.

So, where money is laid out jointly in improving the value of a leasehold vested in two, it is considered in the way of trade, so that it alters the estate in the lease at law, and makes it equitable and divisible. 1 Ch. Gen. Pr., 102, and note. A lease taken

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for the purposes of carrying on a trade, becomes, by operation of law, an incident of that trade. *Foster v. Hale*, 5 Ves., 208. And the law merchant excludes all title by survivorship in a lease taken jointly for the purposes of trade. *Jackson v. Jackson*, 9 Vesey, 597; *Hall v. Haffan*, 2 Lev., 188; *Lake v. Craddock*, 3 P. Wms., 159; *Alden v. Fouracre et al.*, 3 Swanst., 489; *Elliott v. Brown*, 1 Vern., 217.

Where one partner obtains the renewal of a partnership lease in his own name, he will be held a trustee for the firm in the renewed lease. Story on Part., § 174, and cases cited, §§ 176, 7, 8; *Featherstonhaugh v. Fenwick*, 17 Vesey, 298, 311; *Hitchens v. Congreve*, 1 Russell & Mylne, 150, note B; S. C., 4 Russ., 562; *Moody v. Matthews*, 7 Ves., Jr., 174; 3 Sugden on Vend., 169.

"And where purchasers stand in the relation of partners, any advantage secured by one—*e. g.*, the renewal of a lease or an abatement of incumbrances charged on the property, enures to the benefit of the others." Dart on Vend., pp. 434-6; Call on Part., § 181, pp. 169, 170.

These several cases referred to and cited are only three: *Norris v. Le Neve*, 3 Atk., 26; *Randall v. Russell*, 3 Mer., 190; *Hardman v. Johnson*, *ib.*, 352..

Upon looking into these cases we are referred back to the old and leading case of the Rumford Market, being *Reech v. Sanford*, Sel. Ca., c. 61, and other cases covering the "tenant's right of renewal," all of which are fully explained in 4 Bacon's Ab., 221; referred to in *Norris v. Le Neve*, 3 Atk., 38.

In *Norris v. Le Neve*, the end of the particular term or estate for years terminated; also the entire right and interest of the *cestui que trust* in the subject-matter, and in all connected therewith. Therefore, there was a great difference between that case and the Rumford Market case, and other cases of leases referred to. As said in 4 Bacon, 221, above quoted, "such tenants are considered as having an ulterior interest beyond their subsisting term."

So, the case of *Hardman v. Johnson*, 3 Mer., 347, arose on a will. All the "several cases" referred to in 4 Selden, were will cases. The intention of the testator, of course, always prevails. The executor or trustee may do all that the will permits him to do. When he has executed the intention of the testator, he has discharged his trust.

In *Hardman v. Johnson*, the question was called a "new one," showing that Sir William Grant, Master of the Rolls, did not regard *Norris v. Le Neve* as an authority at all on that point. He stated that "he should hesitate a good deal before he refused to apply to it the principle which had been established as to the renewal of a lease. As a new point, his Honor would take time to consider."

But in *Randall v. Russell*, founded on a will, if you grafted the

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fee, or realty, on the leasehold, which was personalty, you directly thwarted the intention of the testator, for he gave "his freehold and leasehold property different ways."

The whole point of the case is summed up in a very few words in Mr. Merivale's note, "that the purchase of the reversion, not from the college, but from the person to whom it had been conveyed by the college, was not, under the circumstances, to be taken subject to the trusts of the will. *Quære*: If the purchase had been from the college itself."

The Court expressly find that, "whether Mr. Hull kept the reversion or sold it, was a matter of indifference to the plaintiffs," and that they were bound to go on and show what right or interest of theirs she acquired or defeated by making the purchase.

We have before shown how seriously the rights of Laffan are defeated by Naglee's purchase. In fact, each case cited by the appellant's counsel was lost, because it lacked the very points on which the respondent relies, and which appear in the case at bar.

The relation between tenants-in-common is in principle very similar to that between lessor and lessee. The possession of one is the possession of the other, while ever the tenure is acknowledged. Cowper, 817; *Williston v. Watkins*, 3 Pet. R., 51.

*Baldwin and Lake*, counsel for Appellants, in reply.

We do not consider that the counsel have met the main propositions in the case.

These are:

1. That Laffan had no greater right than any one else to purchase the fee.

2. That if he had, it was a mere right of purchase—not a right in the thing purchased; and that, like any other person with such right, he must exercise his privilege within reasonable time.

3. That at least he must not have declined to purchase.

4. That he could not, without a tender of the money to be paid by him, get another's property.

How is this answered? Is it at all important whether Laffan and Naglee were partners or tenants-in-common? Though, see 15 Johns., 160; 8 Wendell, 515. The counsel contend that this pre-emptive right in the original lease ran with the land and passed with the successive assignments. But we contend that it did not run at all. It is no reply to say that a right to purchase may run with the land. What we say is, that this right did not. What is this right? A refusal—binding neither Mrs. Hinkley to sell nor the lessees to buy. Even if the lessor had agreed expressly to sell, and lessee not agreed to buy. See *Boucher v. Van Buskirk*, 2 A. K. Marshall, 345, which was the case of an

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agreement of purchase in a lease: *Held*, the agreement was not binding.

The case in *Paige*, 460, was the case of a covenant to convey on receiving \$15 per acre during the term; but here *Mrs. Hinkley* does not bind herself to sell for any price, or on any terms, or to any one; if she chooses to sell and the lessees choose to buy, then there might be a bargain; but until then, the matter was a mere proposition, unacted on, binding no one. Now, it was for the plaintiff to show that a proposition runs with the land and goes by assignment; that a thing void between the parties, becomes valid between other parties by being assigned.

That void in the beginning—conferring no rights then, gets valid as it grows older, and as it affects remote parties.

If *Mrs. Hinkley* had sold the fee to any one else, could *Naglee* and *Laffan* have complained? Certainly not. There was no semblance of a bargain to bind her. How, then, can *Laffan* claim from this clause anything? Is it any better for being in a lease than for being on a separate paper? It seems not. See *Kentucky case*.

It is a mistake to say that 1 *Paige* establishes a right to purchase the fee passing to the assignee. It was a case of covenant to convey the fee on receiving \$15 per acre—giving no option of purchase at all to the lessee.

18 *Johnson*, 184, is not a case of pre-emption given to the lessee at all, but a case of restraint on alienation by lessee of an estate granted. In this case the lessee covenanted, that if he chose to sell, he should give the lessor the right of pre-emption or refusal of buying, and would not sell without his leave first obtained, under his hand and seal; and that on every such sale, with such license, he should pay to the lessor one-tenth of the money for which the premises were sold—and if he broke this covenant the lease should be void. The Court held that “these conditions were neither unlawful, impossible, nor repugnant.”

7 *Cowen*, 287, was the same—except that the Court held this covenant of the lessee extended, by the terms of the lease, to the assignees. We suppose it can not be doubted that the lessor has a right to impose his own terms on his own lease. But this is a wholly different thing from the obligation on the lessor arising from a claim which does not bind the lessor to sell the fee, nor bind the lessee to buy it.

These are the only authorities which appear to approach the point, and the Court sees how far off they are.

If we are so far right, the next question is, whether *Naglee* being co-tenant with *Laffan*, could buy for himself, not the leasehold estate, but the reversion. We have no authority on this point in favor of the principle contended for—nothing but general principles and remote analogies. We are entitled, from the great research and the marked ability of the distinguished coun-

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sel, to say, that they have cited no such case, because in all jurisprudence there is none. We have cited several. We now cite *Blake v. Blake*, 1 Cox, 266, which seems to be in point, and *Maunsell v. O'Brien*, 1 Jones, 176, Exch. R. (Ireland.) In which last case it is held that a lessee has no equity against his sub-lessee who obtains a renewal from the head landlord without consulting him. The principle of this case would seem to fall within the general argument of the counsel, at least as much as the case at bar.

The rule which distinguishes a purchase of the fee from the purchase of the lease, or a renewal of it by one partner or tenant-in-common is given. The rule is, that those jointly interested in a particular subject (a lease *e. g.*) can not deal with the subject for their exclusive advantage. But this rule can not be extended to the purchase of that which is not the joint interest. The lease in this case is the joint property—the fee is not.

A renewal of the lease is held to be a graft on the original lease—a part of it—and therefore the renewal comes within the principle of inhibition—but the fee is not a graft on a less estate—and therefore does not fall within the rule. See the reasoning of Sir William Grant in *Featherstonhaugh v. Fenwick*, 17 Vesey, 311, putting the principle on the ground that a partner renewing a lease for the premises on which the firm did business, might give him a great advantage over his other partners in forcing terms upon them.

BURNETT, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The first and most important question arising in this case is, whether, by the legal effect of the assignment, the right to purchase the fee of Smith and wife passed to Laffan and Naglee?

It is insisted by the learned counsel for the defendant that this presumptive right was a personal privilege, appertaining alone to the first lessees, and not assignable by the terms of the original lease; that it "was a mere possibility; it was an intangible, unenforceable obligation; it was, for any practical purpose, valueless, and could not have entered into the minds of the parties making the arrangements under the lease." The substance of the privilege is well stated by the counsel in these words: "If lessor chooses, at any time hereafter, to sell, and should offer the property for sale, on such terms as she may choose, lessee may have the liberty of buying it, in preference to any one else."

It is certain that this privilege entered into the minds of the original parties to the lease, and was considered of value by them; otherwise there could have been no reason for its insertion in the lease. It will be seen that the tenants were authorized to make whatever improvements they pleased, which

improvements were to become fixtures when the lessor paid for them. By the legal effect of the lease, Mrs. Hinkley was not bound to take the improvements at their value, but she had the privilege of doing so. If she did not choose to take them, then the tenants had the right to remove them. They were only to become fixtures, provided she paid for them. If she did not choose to take them, then the tenants had only the rights that belonged to them, as if this stipulation was not in the lease. On her part she stipulated to give the tenants the preference of purchase, should she determine to sell during the term.

That this privilege was practically valuable, is apparent from those considerations. The lease was on *long* time, at a *low* rent. If rents should go down, this privilege could not prejudice the tenants; but if they remained as they were, or went up, then this pre-emptive right became more valuable. As the lessor was receiving very low rent, paying scarcely any interest upon the value of the property, she would naturally be induced to sell upon very favorable terms, that she might invest the proceeds in more productive property. The tenants had a most complete check upon her asking an exorbitant price for the property. The practical result proved this: as Naglee purchased the reversion for \$17,000, when he had previously given Ward \$42,000 for the leasehold interest. She was receiving only \$300 per annum rent, while the interest upon the \$17,000 at two per cent. per month, (the then current rate,) would have been upwards of four thousand dollars yearly. It was greatly to the interest of the tenants to purchase in the fee, as the lessor might not be willing to take the improvements at their value, and then they could only remove them at the termination of the lease. In every practical view that can be taken of this privilege, it was valuable; and when rents went up as high as they did, it became of great value. For this reason the assignees of the original tenants must have considered it a matter of the greatest importance to them. The privilege of having the refusal of a purchase under circumstances that, in the nature of things, must compel the owner to sell at a very low price, was a most valuable one *practically*, and never could have been disregarded by the purchasers of the leasehold interest. (18 John., 174; 1 Powell on Mortgages; 16 East., 87.

As regards the question whether this covenant in the lease would pass to the assignees of the original tenants, that depends upon the fact whether the covenant ran with the land.

In the opinions of the judges, delivered in the case of Vernon v. Smith, (5 Barn. and Ald., 1,) the doctrine upon this subject is very clearly stated. Mr. Justice Bayley said: "The rule is, that if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be

made with him and his assignee, it passes to his assignee." In that case the covenant was to insure the premises against fire. Mr. Justice Holyrood adopts the rule laid down by Lord Chief Justice Wilmot, that : "Covenants in leases, extending to a thing *in esse*, parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, etc. And if they relate to a thing not *in esse*, but yet the thing to be done is upon the land demised—as, to build a new house or wall—the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised,—as, to build a house on other land, or to pay a collateral sum to the lessor—the assignee, though not named, is not bound by such covenants."

Mr. Justice Best, in his opinion, refers to and adopts the opinion of Gawdy, J., in Spencer's case, in which it was said, "that a covenant that the lessor will, at the end of the term, grant another lease, runs with the land. The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end; but it is beneficial to the owner, *as owner*, and to no other person. By the terms *collateral covenants*, which do not pass to the assignee, are meant such as are beneficial to the *lessor*, without regard to his continuing the owner of the estate. This principle will reconcile all the cases."

The lease of Mrs. Hinkley was to Ward and Smith, *their heirs and assigns*. Every covenant in the lease relating to *the thing demised*, attached to the land, and ran with it. This valuable privilege of pre-emption attached to the entire property, and, therefore, was assignable. It would have been of much less value to Ward and Smith, if they could not have assigned it to those who purchased of them.

There would seem to be no doubt as to the assignable character of this covenant. Woodfall L. and T., 278, 284; 7 Cow., 287; 1 Paige, 455.

The case of *Anderson v. Lemon*, 4 Sand., 552, and 4 Selden, 237, and the cases cited by the Court, are clearly distinguishable from the circumstances of this case. The case from Sandford differed from the present case in these material circumstances : 1. The main business of the partnership was the manufacture of tobacco, and the lease was a mere incident to the trade. 2. The improvements, at the end of the term, belonged to the landlord. 3. The original term of copartnership had expired, and the copartnership was continued from day to day, at the will of the parties, pending negotiations for a new copartnership upon different terms. 4. There was no pre-emptive privilege in the lessee.

The decision of the Supreme Court was reversed by the Court of Appeals, upon the ground that the acts of the partner pur-

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chasing the fee were fraudulent. The Court of Appeals held that "a copartner was at liberty to make the purchase stated in that case, under circumstances free from deception and fraud, and consequently to retain it."

As the covenant in reference to this pre-emptive right of purchase constituted an essential part of the lease itself, and, therefore, ran with the land, the several assignments made by Ward, Smith, and Naglee, were ample to carry to the assignees, respectively, this right. Unless there had been a clear and unmistakable reservation of this privilege in the assignment, it must have passed along with the leasehold interest to the assignee.

The second question arising in this case is, whether the purchase by Naglee of the fee in his own name, and with his own money, enured to the equal benefit of Laffan. This question is naturally divisible into two heads: 1. Were Naglee and Laffan copartners? 2. If so, did Laffan, under the circumstances of this case, waive his rights?

We think there can be no doubt as to the question of copartnership. We have substantially decided this point in the late case of *Gray v. Eaton* and others. In that case, we held that there could be a partnership in the purchase and sale of lands, and we can see no difference in principle between such a partnership, and that in the joint purchase, improvement, and leasing of property for profit. All the circumstances necessary to constitute a partnership, existed in this case. The copartners contributed equal portions of the cost of the property, and then divided the net profits arising from the rents. The purpose of the arrangement was the profit to be derived from the property when leased to others, and not the enjoyment or use of it by the individual copartners themselves. The property was purchased and improved for the purpose of carrying on the regular joint business of leasing the same for profit. The relation the parties sustained to each other was not that of mere tenants-in-common; it was something more; it was that of partners.

The question as to whether Laffan waived his right to share in the fee, is one of some difficulty. In considering this point, we must keep in view the facts that the parties were copartners; that this pre-emptive right was a part of the partnership property; and that Naglee was the *sole* managing partner. The relation that Naglee sustained to Laffan was one of great confidence, requiring the utmost good faith on the part of Naglee. The proof, therefore, that Laffan waived his right, must be clear.

The plaintiff alleges, in his complaint, that the purchase of the property, through Bolton, was made clandestinely, by Naglee, with intent to defraud his copartner. The deed from Smith and wife to Bolton, was acknowledged and recorded October 15, 1851. The deed from Bolton to Naglee, was acknowledged on the eighteenth of December, 1851, and recorded on the nineteenth.

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The mortgage from Naglee to Bolton was acknowledged on the fifteenth of October, 1851, and recorded on the nineteenth of December, 1851. It was shown that Laffan left San Francisco for New York on the sixteenth of December, 1851, and returned November 1, 1854. In reference to the two deeds and the mortgage, Mr. Bolton testified that they were to have been executed all on the one day; that he had supposed they were so consummated, but could not then assign a reason why they were not.

These circumstances certainly made out a *prima facie* case of fraudulent concealment. In his answer, Naglee alleged that Laffan had notice of his intention to purchase the property, on his own account; that Laffan declined to join in the purchase; and he, accordingly, purchased for himself. To sustain this allegation, and to disprove the alleged fraudulent concealment, Naglee produces, in evidence, with the consent of the plaintiff's counsel, a letter written by Laffan, on board the steamer Panama, off San Diego, and dated December 17th, 1851. Before leaving, Laffan had appointed Issaac E. Holmes his agent and attorney, and the letter was addressed to him. After stating that, "leaving in a hurry, he may have omitted many things," and after referring to some other matters, the letter contains this reference to the purchase of the fee:

"Naglee told me Bolton, Barron & Co. bought the ground on which our building and his, on the corner, stands, for, I think, \$17,000, and that my portion would be one-fourth. Considering that I had already paid \$12,000 for the lease, I thought the one-fourth more than my proportion; but when I was prepared, I would be willing for two persons to say what it should be. Admitting my account, which must be insisted on, he ought to owe \$2,000 for rent account to first of December, if all be collected, besides the current rents."

In the same letter, he states his "aim shall be directed to procure, if no more, ten or twelve thousand dollars, in order that you may, by your management, save the brick house for my children. This will be important, and let other matters take their course."

If we take this language, in connection with the established facts, then the following conclusions seem plainly to flow from it:

1. That Laffan knew that Bolton had purchased the fee of the entire property for \$17,000.
2. That the purchase was made for him and Naglee in their respective proportions.
3. That Naglee and Laffan did not agree about the proportion of the \$17,000 to be paid by Laffan.
4. That Laffan was to pay his rightful proportion when he was prepared.

5. That Laffan's first object was to save the property for his children.

This letter clearly disproves Laffan's allegation of fraudulent concealment, while it as clearly disproves Naglee's allegation that he told Laffan he intended to purchase on his own account, and that Laffan declined to join in the purchase. Both parties seem to have forgotten some of the circumstances. This was not at all surprising, as both parties had passed through a severe financial ordeal, and their complex transactions had taken place some four years before the commencement of the suit.

There was nothing suspicious in the fact that Naglee took the deed from Bolton in his own name. Naglee had about five-sixths interest in the fee, and became *solely* accountable to Bolton for the loan of the purchase-money. Besides this, it would have required separate deeds from Bolton, and separate mortgages back to him. Laffan being then very much embarrassed in his circumstances, and the purchase being made on credit, it was very natural that Naglee should not be willing to be solely bound for the purchase-money, without any security, and it was equally proper that Laffan should have consented to this form of the conveyances.

For the purpose of showing that Laffan had waived his right to participate in the purchase of the fee from Smith and wife, the defendant gave in evidence a copy of a written proposition, dated November 3, 1853, and signed alone by Naglee, wherein he recites that Holmes claimed the interest of Laffan in the leasehold property; that Laffan disputed Holmes' claim; that the fee of the property was then in Naglee; and then goes on to state that in consideration of one dollar paid by Laffan to him, and divers other good considerations, Naglee agreed to sell one-half the fee of the lot for the sum of ten thousand dollars, one-half payable within nine months, and the other half out of the first rents thereafter accruing to Laffan. Naglee left the writing with Laffan, and kept no copy, but afterwards wrote Laffan for a copy, which was furnished in the handwriting of Laffan, and this copy was given in evidence.

It was also insisted by defendant that Laffan had lost his right by delay.

It was admitted by the parties, on the trial, that Isaac E. Holmes, the attorney in fact of Laffan, had "so managed the affairs of Laffan as to procure or suffer certain judgments to be rendered against said Laffan, under which the leasehold in the property in controversy was sold, and purchased by Holmes, for his own use; and that, shortly after the departure of Laffan, Holmes claimed the property for himself, until July 31, 1854, when Laffan instituted a suit against said Holmes, in which said Naglee was appointed receiver; and such proceedings were had that, in the fall of 1855, the purchases by Holmes were set aside,

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as fraudulent and void, and said Laffan restored to his property," etc. The original complaint, in the case of *Laffan v. Holmes*, charging fraud against Holmes, was verified by the affidavit of Naglee, who acted as the agent of Laffan, stating, in the affidavit, "that the facts, matters, and things mentioned and alleged in the complaint, were peculiarly within the knowledge of affiant."

The copy of the proposition of Naglee was endorsed in his handwriting, as follows: "A proposition—H. M. Naglee to E. Laffan, Nov. 3, 1853, for nine months."

This proposition was made to Laffan in New York, about a year before his return to San Francisco, and while Holmes was in possession of Laffan's leasehold property and receiving all the rents. The only proof that Laffan ever accepted the proposition, is the fact that he had it in possession, and sent Naglee a copy at his request. There is no proof that he acted upon it in any way. At the time it was made, the circumstances were such that he could not act. Under these circumstances, we can not infer that the proposition was accepted. It is true that it gave notice, to Laffan, of the fact that the property was then held in the name of Naglee. But he was not in a condition at that time to accept or reject. Nor was Naglee in a condition to comply. This seems evident from a clause in his proposition. He first states that Laffan contemplated proceedings against Holmes, to controvert his claim to the property, and then, in the close of the proposition, states: "But it is expressly understood, that if the legal proceedings aforesaid should be abandoned before the time aforesaid, then this agreement should be void." From this condition, it seems evident that Naglee, at that time, supposed that he held the legal title for the party entitled to the leasehold interest, and that he wished to reserve the undivided half in his own name, until it was ascertained whether Holmes or Laffan was the proper party to receive the deed.

As regards the alleged delay, we think there is nothing in the objection, when the circumstances are considered. Laffan left December 16, 1851, and his agent, Holmes, very soon so managed matters as to become himself apparent owner of the property; and it was not until the fall of 1855, that the question with him was set at rest. From that period until the commencement of this suit, (February 5, 1856,) there was not more than a reasonable time for consulting with counsel, and preparing the papers for this suit.

The property in the fee having been originally purchased for the benefit of both parties, in accordance with the terms of the lease, it still retains the character of partnership assets; and the *onus* of proving that Laffan had waived his right, resting upon the defendant, and his proofs not sustaining his allegations in this

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respect, the interlocutory decree of the Court below was correct.

It now becomes necessary to notice the exceptions made by defendant to the report of the referee.

The first exception regards the original proportion of the whole purchase-money of \$17,000, which Laffan was bound to pay. The referee adopted this mode. He deducted from the cost of the fee of the entire demised premises, the proportionate value of the strip of twenty-eight feet nine inches, dedicated for Merchant street. The whole lot, described in the lease of Mrs. Hinkley, fronted sixty-eight feet nine inches on Montgomery street, running back one hundred and thirty-seven feet six inches. The strip, twenty-eight feet nine inches, by one hundred and thirty-seven feet six inches, was taken from one side of the lot for a street, in November, 1850. Naglee at that time received from various parties altogether the sum of \$10,600 for opening Merchant street.

It is insisted by the learned counsel for the plaintiff, that the street was dedicated in 1850, in anticipation of Naglee's purchasing the fee; and that, when he obtained the fee, "he yielded the dedication of the street as a thing of course—as a matter of mere duty and obligation, for which he was prepaid."

But this ground does not seem to be well taken. It seems clear that Naglee was only paid the value of the interest he then held in the strip, and no more. He paid for the whole leasehold property \$42,000, and estimating his leasehold interest in the strip dedicated for the street at its proportionate value, the amount exceeds \$17,000, when he only received \$10,600. The difference was no doubt made up of his own portion of the contribution. Those who paid him, no doubt knew that Smith and wife must sell, and Naglee must buy, and that when the street was *once* open, whoever did purchase the fee of the demised premises, would be compelled, by their own interest, to keep open the street, otherwise the rear of the property could not be approached. But there is no evidence to show that Naglee *agreed* to purchase this strip, or that, in case he did purchase it, he would continue the dedication. There was no obligation imposed upon Naglee to dedicate the fee, and when he did so dedicate it, it was for the common benefit of the property, in proportion to the respective interests of himself and Laffan. If Laffan asks to share the benefit of this dedication, he should bear his proportion of the price. The \$17,000 should have been estimated as the cost of the lot, forty by one hundred and thirty-seven feet six inches, and the relative proportion of the purchase-money ascertained upon that basis. It is clear that Laffan had the benefit of the street up to the termination of the lease; and if he asks an interest in the fee, he must bear his share of the cost of that which renders his

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own portion valuable. We think the referee erred in this respect, and this exception should have been allowed.

The second exception to the report of the referee is, that Naglee was not allowed compound interest. This exception, we think, is not well taken.

The third exception is, that the referee credited the plaintiff with fifty dollars per month ground-rent, from October 15, 1851, to April 9, 1855, the time of the expiration of the lease, with the interest upon each month's rent. It is stated by the learned counsel for defendant, that the referee estimated the amount of this ground-rent which Naglee was compelled to refund, at four thousand two hundred dollars principal, and three thousand seven hundred and eighty dollars interest; making, in all, the total sum of seven thousand nine hundred and eighty dollars. The counsel has not referred us to the page of the record; but if his statement is correct as to the *amount*, the referee has charged Naglee more than double the proper sum. The rent, at the rate of fifty dollars per month for the time specified, would not quite amount to two thousand one hundred dollars, exclusive of interest. As to the principle requiring the ground-rent to be refunded, we think there was no error in the report of the referee.

The other exceptions to the report, we think not well taken.

For the reasons stated, the judgment must be reversed, and the cause remanded for further proceedings.

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ELLIG *et al.* v. NAGLEE AND SHARP, TRUSTEES.

When trustees act with good faith, in the management of the trust property, and without selfish motives, they are entitled to be treated by a Court of Equity with liberality and indulgence, and especially when they act under the advice of counsel.

Very supine negligence, or willful default, will render them liable; but to make them liable for mere errors of judgment, would tend to discourage good and prudent men from undertaking the trust.

Delay, on their part, in bringing suit to recover the rents of the trust estate, if subsequently approved by the *cestui que trusts*, will excuse them.

Money advanced by the trustees to the *cestui que trusts*, with the understanding that the same should be repaid out of the rents of the trust property, is a lien only upon the net incoming rents, and not a lien upon the trust property.

The same is true respecting the charges for legal services of one of the trustees in the management of the trust property. The rents must be applied to the payment of such allowances until they are liquidated.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This was a suit in equity, to obtain an account from the de-

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fendants, as trustees of Mary Ellig and John Ellig, (now deceased,) and also the surrender of the trust estate, and charging the defendants with negligence and mismanagement of the estate, and claiming a judgment for \$13,500, rents alleged to have been collected by the trustees, and not paid over, and also praying a restraining order of Court against defendants during litigation, etc. The facts are as follows:

John Ellig, deceased, about the eighth of March, 1853, intermarried, at San Francisco, with the appellant. About the same time, but after the marriage, John executed to Mary, directly, and without the intervention of a trustee, by deed bearing date on the eighth of March, 1853, a conveyance for a fifty-vara lot, numbered sixty-three, on the south-west corner of Dupont and Broadway, in San Francisco. This lot was his separate property, having been acquired before the marriage. The consideration recited is one dollar, "as well as the consideration of love and affection."

The improvements on the lot, at the time the conveyance was made, were without value, consisting of small wooden shanties.

On the thirteenth of March, 1854, John and Mary joined in a conveyance of this lot to the defendants, "to be held by them, in trust, for the benefit of the said parties of the first part," and under the following provisions: The defendants, as trustees, "to rent and lease the premises in such manner and upon such terms as they think most advantageous. They shall collect the rents, and after making all proper repairs, expenses, taxes, and assessments, shall hold the residue subject to the order of the said parties of the first part, severally, to be equally divided by said trustees between them; and the separate receipt of the said parties of the first part shall be a full and complete discharge to the said trustees." The respondents also signed this instrument. No improvements had been made upon the lot during the period intervening between the execution of these two indentures.

On the twelfth day of May, 1854, the trustees entered into an indenture of lease of the entire lot, conveyed in their names as trustees for John and Mary Ellig, as lessors, with H. E. Brown and Rufus Keyser, as lessees, for a term of ten years. This indenture reserved a monthly rent, payable in advance, (\$750) on the first day of each and every month during the term, with a covenant that in case default should be made in the payment of the rent, or any part thereof, for thirty days after the same should become due, "then the whole of said rent, for the unexpired portion of said term of ten years, shall become due and payable" from the lessees to the lessors. The lessees also covenanted to pay all taxes and assessments on the property; and that, within four months from the demise, they would commence the erection of three-story brick buildings on the premises, to

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be completed within one year, and "that the said premises shall be completely built over with brick buildings" before the first day of January, 1857. Provision is then made for a renewal of the lease, if desired, or an estimate of the value of the improvements at the end of the term. In case there was no renewal, the lessors to pay two-thirds of the estimated value.

This indenture of lease was subsequently ratified by John and Mary Ellig, by an instrument apparently intended as a duplicate, in which all the parties united.

The lessees immediately proceeded to erect the three-story brick buildings. At the date of the first assignment of this lease to Sherman, in November, 1854, they had expended \$20,000 in the improvements made up to that date. They eventually expended \$35,000 in all.

In November, 1854, the buildings being unfinished, the lessees assigned the lease, as collateral security, among other securities, to Wm. T. Sherman, of the banking-house of Lucas, Turner & Co., for a loan of \$5,000, to be applied toward the completion of the buildings. A second loan of \$5,000 was obtained from Sherman, to be applied to the buildings, and the assignment treated as security for that also. The date of the second loan is not given, but it was before the fifteenth of March, 1855. On that day Sherman pressed the lessees for payment of the first loan, when Brown, one of them, confessed his inability to pay, and recommended Sherman to secure himself. Sherman then took Brown to find Sherman's counsel, "and got him to fix a proper document," and he then drew a second assignment; and on the fourth of April, following the arranged plan of securing himself, Sherman went with Brown, the managing lessee, through the buildings then occupied, and made the tenants attorn to him. Sherman considered himself liable for the ground-rent from that day, and not before. The defendants fixed his liability for the rent reserved in the demise, from November, 1854, instead of from the fourth of April, 1855.

Then follows a long negotiation, by the defendants, with Sherman as the assignee of the lease, to pay the rent, resulting in an action against him, by them, on the covenant. Sherman claimed \$5,000 out of the property, and, as a set-off, acknowledged his liability for the ground-rent, from the fourth of April, 1855, when the tenants attorned.

The defendants demanded payment of him from the date of the first loan and assignment of the lease in November, 1854. Brown and Keyser became insolvent in February, 1855. Many propositions passed between them. A reduction of the rent to \$500 per month was rejected by Sherman. This was in June, 1855.

But before the suit was instituted, and on the thirtieth of August, 1855, pending these negotiations, Sherman, under the ad-

vice of his attorney, assigned the lease to one Jefferies, a man of doubtful responsibility. Notice was not given to the defendants of this assignment until after it was made. Waddington, a tenant on the premises, collected the rents for Sherman, and deposited the money with Lucas, Turner & Co. Waddington also collected the rents for Jefferies and deposited the money with the same banking-house. Naglee and Sharp, on the eleventh of June, 1856, and after having advised with counsel from time to time respecting the trust property, commenced suit for the whole amount of rent, \$85,000, which was determined in December, 1856, against the trustees.

John Ellig was privy to these negotiations and their results. He knew that the suit was commenced for the \$85,000, and assented to it. This he did after advising with other parties besides the defendants. He expressed himself "perfectly satisfied with Mr. Sharp and Mr. Naglee, and their management of the trust property." He died on the twenty-second of March, 1856, and left a last will and testament, which has been probated, making his wife, plaintiff, the legatee.

On the twenty-fifth day of October, 1856, the plaintiffs instituted this suit.

The defendants answered, denying the charges in the complaint, and offering to resign the trust. The answer made an exhibit of a detailed statement of the management of the trust fund; and, also, of advances made from time to time by the defendant, Naglee, to John Ellig in his lifetime, and also to Mary, his wife, amounting in the aggregate to \$11,090 26; also, setting up an indebtedness on the part of the *cestui que trusts* to the defendant Sharp, for legal services, in the management of the trust property, amounting to \$1000, and claiming a lien upon the trust property.

When the case was called up for trial in the Court below, it was, by consent of counsel, referred to a referee, who subsequently reported in favor of the claims of defendants to the whole amount set up in their answer. This report was confirmed without objection. Subsequently, the case came on for trial, and the defendants contended that the matter was closed by the report of the referee. But the Court held that the plaintiff might proceed to establish the allegations of the bill, and witnesses were accordingly introduced.

The Court below, in its decree, after negating the charges in plaintiff's bill, decreed that the sum of \$11,090 26, advances made by defendant Naglee, and the sum of \$1000, due defendant Sharp for legal services, was a lien on the trust property, and that the same should be sold to pay the amount.

From which decree the plaintiffs appealed to this Court.

*Charles H. S. Williams* for Appellants.

The defendants were trustees, and, as such, were bound to exercise perfect good faith and fidelity, and ordinary diligence, skill, care, and discretion, in the management of the trust.

When they do so—if loss occurs, they are not liable for it; but, if they are guilty of neglect, or fail in either of these particulars, they are to be held to a strict account, and must themselves make good the loss. This general proposition, it is believed, will not be controverted—at least, it is unnecessary to cite authorities to sustain it.

I propose to briefly examine the evidence in this cause, to see, first, whether a loss has occurred, and what it is, and then, whether the defendants could have prevented it, by the exercise in good faith of ordinary or reasonable care, skill, diligence, and discretion, and to point out some manifest errors of law in the decree or judgment.

1. That there has been a loss, needs no argument. The case shows that not a dollar of rent has been collected, since that due on the first of November, 1854. The amount accruing, according to the lease, to October, 1856, when this suit was commenced, is \$16,500. Mrs. Ellig, instead of having these rents as they fell due, to defray her necessary expenses, and accumulate the balance, with its interest, has been compelled to borrow money from Mr. Naglee at two and two and a half per cent. per month, to pay for her food and clothing, for which money and interest Mr. Naglee now has a judgment. If the whole rent reserved is not the proper basis for an estimate of the amount lost, for the reason that the property, if possession had been taken, might not have produced so much in the latter part of the time as \$750 per month, still it is proved that after the thirtieth of August, 1855, when Sherman assigned to Jeffries, there was received the net amount of \$9000.

2. Could this money have been collected by the exercise of reasonable and ordinary diligence and discretion—leaving out of view, for the present, the suit for \$85,000?

In November, 1854, when Sherman informed the trustees that he held the first assignment of the lease only as security for a loan, and was not in possession, nor receiving rents, their remedy and their duty seem to have been plain. Brown & Keyser were able to pay then, and an attachment would have brought the money. They paid Sherman the \$5,000 loan, and Sherman testifies that they were solvent, till about the fifteenth of March, 1855. But if they were not able to pay, there was a clear right to enforce the payment, by demanding each month's rent at the proper time, and in the proper manner; and proceeding summarily under the statute, to forfeit the lease, and re-enter. This would have brought the money, for the improvements were nearly completed, and the trustees would have got the benefit of several thousand dollars expended on the premises, or the lessees,

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or their assignees, would have paid up. There was not the least difficulty in collecting the rent up to the time Sherman took possession under the second assignment, April 4th, 1855.

From the fourth of April, Sherman acknowledged himself liable for rent, and offered, and was always willing to pay it. But the trustees would not receive it, unless he would pay that which accrued before he took possession, for the collection of which they had not taken a step, and for which Sherman clearly was not liable. So they continued to leave the rent uncollected from that time until the thirtieth of August, 1855, when Sherman, to relieve himself from further continuance of his liability, assigned the lease "to a beggar," and gave the trustees notice of the assignment, and afterwards had nothing to do with the lease or property, directly or indirectly.

3. Is the commencement of the suit for \$85,000 against Sherman, on the eleventh of June, 1856, and its prosecution to a defeat, a sufficient answer to the charge of negligence in omitting to take any measures for the collection of the current rents, as they accrued, from November, 1854? We submit that, instead of being a mitigation, it is an aggravation of the negligence and mismanagement charged.

It is claimed, and seriously insisted, that on the eleventh day of June, 1856, they filed their complaint, and commenced their suit in the Twelfth District Court, claiming to recover \$85,000 for the whole remaining term against William T. Sherman, who had assigned the lease, and divested himself of all connection with the estate on the thirtieth of August, 1855, more than nine months before the complaint was filed; and who testifies that he had been always ready and willing to pay the rent from the time he took possession till he parted with all interest in the lease, and always so avowed himself to the defendants, but they would not receive it without the payment of what accrued before he entered. There is a consent of Mr. Bowman, Sherman's attorney, endorsed on the complaint, that it might be filed, "*nunc pro tunc*," as of December 11, 1855, and admission of service is ante-dated to that day. This was well enough, so far as Sherman was concerned; but when the question of diligence of the trustees arises, Mrs. Ellig can not be concluded by Mr. Bowman's "*nunc pro tunc*" stipulation. The time had passed. Jefferies had been for nine months receiving the rents, and no stipulation of Sherman could cure this negligence. The complaint was not in fact filed till June, 1856. The suit, if commenced on the "*nunc pro tunc*" day, 11th December, 1855, might have been tried long before the complaint was, in fact, filed. But suppose it had been filed 11th of December, 1855. Sherman had assigned more than three months before that, and the commencement and prosecution of this suit, is the sole answer to the plaintiff's charge of mismanagement of the trust estate.

4. The moneys advanced to Mrs. Ellig and her husband were not expended in the execution of the trust, and constituted no lien on the land, and no Court has any power to make that debt for money loaned at two or two-and-a-half per cent. interest, a specific lien on the land. The debt was the proper subject of an action at law against the persons respectively, to whom the money was loaned, and could not be adjusted in this suit; for, if not a lien on the property, the Court below has no power to decree its payment as a condition precedent to the surrender of the trust, on the ground that it had been abused. Neither could the \$1,000 allowed to Mr. Sharp for prosecuting the \$85,000 suit be made a lien.

5. That part of the decree is erroneous which adjudges that Mrs. Ellig pay in the first instance, the balance against John Ellig for advances made to him in his lifetime on account of his separate half of the rents, and his share of allowance to Mr. Sharp.

The plaintiffs respectfully submit that the portions of the decree herein claimed to be erroneous should be reversed, and such a decree made by this Court, as the case shows the parties entitled to. And particularly that it should declare and hold the defendants, or, at least, the defendant Naglee, liable for the rents from and after the month of November, 1854, either at the rate of \$750 per month for the whole term to the commencement of this suit, or, at least, from that time to the thirtieth of August, 1855; and the rents actually realized by Jefferies after that time, \$9,000, which might have been realized by the trustees if they had re-entered; crediting to the defendant Naglee the sums actually advanced by him to Mrs. Ellig, beyond his receipts; allowing him no interest, because he might have collected the money before the advances were made, but charging him interest from the several times when the rents ought to have been collected; and that the trustees be discharged, and the property be restored to Mrs. Ellig, free and clear from all claims and incumbrances in favor of, or created by the defendants, with such other provisions as shall seem proper.

It is especially desired that in passing on this appeal the Court declare and settle fully the rights of the parties, in order that the property may be relieved from the embarrassments in which the defendants have involved it.

*Halleck, Peachy & Billings, and Gregory Yale*, for Respondent Naglee.

Have the defendants been guilty of such negligence in the management of this trust estate, as to make them responsible for an uncertain sum, as alleged?

In the argument it was urged that the Judges of this Court would not have managed the trust estate in the same manner

that the trustees did ; and if the Judges, with the lights before them, would not have done so, the trustees are to be measured by this criterion, and, if wanting, adjudged indiscreet and liable. In other words, a Court of Equity will, in such cases, require that a trustee should act with all the scrupulous circumspection, caution, and wisdom, with which the Court itself, from its long experience, and superior means of information, is accustomed to act ; a doctrine certainly somewhat perilous to trustees, and startling to uninstructed minds. It is, to adopt the language of Lord Bacon, substituting for the private conscience of the trustee, "the general conscience of the realm, which is chancery." 2 Story's Eq., § 1273.

It is not easy, in a great variety of cases, to say what the precise duty of a trustee is. The cases in which his acts will be deemed violations of trust, for which he will be held responsible in equity, are difficult to be defined. § 1267. As he is supposed merely to take upon himself the trust as a matter of honor, conscience, friendship, or humanity ; and as he is not entitled to any compensation for his services, at least not without some express or implied stipulation for that purpose, he would seem, upon the analogous principles applicable to bailments, bound only to good faith and reasonable diligence, and, as in case of a gratuitous bailee, liable only for gross negligence, although their acts are not always measured by such a rule. § 1268.

There is another general principle, as stated by Lord Hardwick, that the rules holding trustees to personal accountability should not be laid down with a strictness to strike terror into mankind, acting for the benefit of others and not for their own ; and that as a trust is an office necessary in the concerns of man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be manifest hardship, and would be deterring any one from accepting so necessary an office. § 1271. The true result of the considerations here suggested, (§1272,) would seem to be that, where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing to the management of the trust property. This general rule is independent of some artificial rules, respecting particular matters, laid down by Courts of Equity, and not applicable to this case.

The general principle on which the liability, resulting from gross negligence, proceeds, is illustrated by the cases, a few of which only are necessary to be presented. In *Tibbs v. Carpenter*, 1 Madd. Rep., 166, there was a direction, by the testator, to

the executor, as to the disposition of the accumulated rents after the death of the testator's wife, should she survive him. She survived him eleven years. There were arrears of rent, as reported by the Master, of £1,500, due certain legatees. The question was, how far the executor should be held responsible. The Vice-Chancellor says, in his opinion, that the executors have "not produced any evidence in their exculpation; and I am under the necessity of deciding, in the absence of all evidence, on behalf of the executors." He says: "If, therefore, there be *crassa negligentia*, and a loss sustained by the estate, it falls upon the executors. Here, for want of evidence, I can not say that all this rent could not have been recovered; and I am reluctantly obliged to assume that no exculpating evidence could be produced, and, therefore, they must be charged with these arrears. Interest on the arrears was faintly asked for, and ought not to be given."

In *Bruyton v. Bruyton*, 1 Mylne & Craig, 80, an attempt was made, by some legatees, to fix a personal liability upon one of two executors, because he failed, when requested, to unite with the other executor in selling certain securities, Mexican bonds, at a period of the market when a higher price could have been obtained than the price realized when sold at a later period.

The opinion was delivered by Sir John Leach, Master of the Rolls, against the claim of the complainants. He says, very emphatically, "I can find no case, and none has been produced, in which an executor has been called upon to bear the loss that has arisen, because, in the *bona fide* exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately." And this discretion, he says, can be exercised by each, independently of the other. Otherwise the effect would be to rest the whole discretion in one. "If a discretion rests with one of two executors, it must surely follow that the discretion can not be taken away by the other coming to a different conclusion. One is not bound to agree with the other. In case of a diversity of opinion, they can only resort to some higher authority which is competent to control them both."

He further remarks, in this case, respecting the case of *Tibbs v. Carpenter*, that, as reported, it is a very strong decision, and that there was considerable delay, and also circumstances amounting to *crassa negligentia*, on the part of the executors, showing that they took no trouble, and did not attempt to exercise any judgment as to when the money should be called in. *Blue v. Marshall and Wife*, 3 P. Wm., 381; *Garrett v. Noble*, 6 Simons, 516.

The general principle is stated by Sir L. Shadwell, Vice-Chancellor: "The rule of law is, that where trustees *bona fide* exert themselves to discharge their duty, and merely commit an error in judgment, unless there is a plain violation of trust, they

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shall not be visited severely. The fair exercise of their judgment is a protection to them, although the consequences may be bad. Here, in the first instance, there was a difficulty, and they set themselves to cope with it as well as they could."

The general rule, fixing the liability of the trustee, is stated by Mr. Justice Woodbury, as the doctrine of the Supreme Court of the United States. He will not be held accountable for more money than he has actually received, except "in cases of very supine negligence, or willful default." *Taylor v. Benham*, 5 How., 275.

The case of *Garrett v. Noble* is important, and in point in another particular. If the party interested in the subject of the bill was cognizant of the proceedings, and made no objection in his lifetime, and did not complain of the acts of the trustees, his representations after his death could not charge them with a breach of trust. The Vice-Chancellor expressly holds this doctrine.

All the transactions complained of, in the case at bar, took place in the lifetime of Ellig. He died in March, 1856, long after the suit against Sherman had been commenced. The complainant in this suit says that, until recently, that is, on the 25th of October, 1856, when the bill was filed, she was satisfied with the acts of the trustees.

The witness Gunnell says that he frequently conversed with Ellig, and that he expressed himself "perfectly satisfied with Messrs. Sharp and Naglee, and their management of the trust property. He consulted me about taking the house off Sherman's hands, and I told him I would not, but would hold Sherman on the lease. He said he was perfectly satisfied, and would do so."

It may be said, by way of explanation, that, in fact, the executors of Ellig, though nominally parties to the complaint, are not uniting with Mary Ellig to establish a breach of trust against the defendants. The suit was commenced before the will was probated, or letters testamentary granted. Amendments were afterwards made, making Mudge one of the executors, by appointment in the will, and the present husband of the plaintiff, who became executor by the joint operation of the will and the marriage certificate.

The object of this was to have the estate represented in the suit. The plaintiff did not sue in her capacity as executrix, though she sets up an unprobated will, and claims as legatee under it. If their representatives, now before the Court in that capacity, were urging the charges of a breach of trust against the defendants, the doctrine of *Garrett v. Noble*, upon the last point, would imply.

Judge Story lays down the same rule. Equity will not allow the representatives of a *cestui que trust*, who has acquiesced in

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the acts of the trustee, to proceed against him, upon the general maxim: *vigilantibus, non dormientibus, equitas subvenit*. § 1284.

The same principal is extended to the actual commission of a breach of trust, and the acquiescence of the *cestui que trust* after knowledge. "If, after the commission of a breach of trust, the trustees have given full and complete information to the *cestui que trust*, and they have acquiesced in the existing state of things, and have dealt with the trustees on the footing of that acquiescence, the breach of trust will be considered as waived." *Adams' Eq.*, Am. ed., 1855, 62.

John Ellig not only acquiesced in, but actually approved of the conduct of the defendants in respect to the suit for \$85,000. The plaintiff complains of the suit because the defendants were defeated. Why did she not complain at the institution of the suit, if that act amounted to a breach of trust? Or did she await the result, in order to judge by that? Would she have received the \$85,000, had that sum been collected by that suit? It will not do to press the question. On the argument her counsel thought not—that the \$750 per month was better.

Here, another elementary principle can be invoked. If a breach of trust has been committed, and all the *cestui que trusts* did not participate in it, the loss, before falling on the trustee, must first be made good out of the trust estate of the person who consented. *Trafford v. Boehm*, 3 Atk., 444.

The proof being clear that John Ellig participated in the alleged breach of trust, committed by suing for \$85,000, the plaintiff must first look to his estate for the loss. She being the beneficiary, under the will, or upon the ceasing of the trust by John's death, she actually occupies the remarkable position of suing herself, while traducing her late husband's memory in attempting to recover.

Again, it is a rule that where it becomes necessary for a trustee to act by the hands of another, or where, according to the common usages of mankind, it should be done, he is not to be made responsible for his losses. 2 Sto. Eq., § 1269.

In this case, the defendants, when the difficulty respecting the rents occurred, consulted a respectable legal firm, of which Mr. Sharp was a member. They placed themselves, as respects their judgment, in the hands of Judge Aldrich and Mr. McDougall. They did not tell these legal gentlemen to pursue any particular course of action, or to institute any particular suit, but to act in the premises as was most proper for the interests of the Elligs. Had they been advised to make a particular demand for the surrender of the premises, which seems to be the great *desideratum* in their conduct, that advice would no doubt have been followed, or any other particular mode would have been adopted. But could the defendants have adopted a course of conduct in opposition to the one advised by their counsel? It

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could then have been said, had the premises been demanded without a re-entry clause, instead of a suit on the covenant for the whole rent, that such a suit should have been brought, that counsel had advised it, and that the \$85,000 was due by the bond—that they should in fact have demanded the pound of flesh.

Such a predicament would have been worse for the defendants than the present.

The rule establishing the protection of a trustee, in case of an error committed under professional advice, is recognized in England and America. *Vez v. Emery*, 5 Ves., 141; *Thompson v. Brown*, 4 John. Ch., 629.

Not a word escapes the plaintiff as to the unconscionableness of the bargain with Brown & Keyser. She is ready to reap all its benefits, and demands at the present day the \$750 per month. These men should have been taken in charge by a Court of Chancery, when they were about to sign the lease, as *non compos mentis*. The only inequitable act perceptible by the defendants, consisted in obtaining this contract. Yet the plaintiff is not satisfied with exchanging the unimproved lot, through the medium of the trustees, for a lot "completely covered over" with three-story brick buildings, but refuses to give the defendants credit for so favorable a bargain. They should be entitled to the average result of their administration, at least—the good with the bad; but she wants them to pay the rent, also, of these fine buildings, now belonging to her, built up under their administration. And why? Not because they have got the money out of the property, but because a question of law arose out of the contract of demise, about which there was some difficulty in arriving at a certain solution; and the defendants, instead of determining the question themselves, were guided in their conduct by the advice of gentlemen whose profession it was to bestow it.

And this is the act of gross negligence for which they are liable! The first instance where parties were blamed for seeking counsel and following their advice in the discharge of a fiduciary duty, and perhaps the only instance where gross negligence was defined to consist of positive acts in aid and protection of an interest, instead of willful omissions concerning it.

No question is made about that portion of the decree authorizing the mode of collecting the sum admitted to be due the defendants.

BURNETT, J., delivered the opinion of the Court—FIELD, J., concurring.

The first point made by the plaintiffs' counsel is that the Chancellor erred in finding that the trustees had fairly discharged the trust.

It appears that Sherman entered under his assignment, on the fourth of April, 1855, and that defendants called upon him for

the first time in that month. This delay in calling upon Sherman was well accounted for, from the fact that the assignment to him was only intended as a mortgage to secure a loan of \$5,000, and was unknown to the trustees until he entered to receive the rents in April. The rents due on the twelfth of November, December, January, February, and March—five months—had not been collected of Brown & Keyser, although they were then solvent. But this delay was justified by the fact that Brown & Keyser were then putting up permanent improvements upon the property, at a cost of some \$35,000. These improvements were completed in April, 1855. This indulgence was no doubt given to the lessees to enable them to finish their improvements, and was a prudent and justifiable act on the part of the trustees. From April to October 1, 1855, there were some six months wasted in fruitless attempts to compromise with Sherman. There was a clause in the lease to the effect that if the rent remained unpaid for thirty days after due, then the rent for the whole unexpired portion of the term should become due and payable at once. It appears from the testimony of General McDougall, that about the first of October, 1855, the law firm of which he was a member, consulted about the lease, and the trustees were advised to bring a suit against Sherman for the entire rent of the remaining portion of the term, amounting to some \$84,000. The complaint was not filed, however, until June 11, 1856, and the suit was determined in December, 1856, against the trustees. It is true, that by a stipulation of the attorneys, the complaint was filed *nunc pro tunc*, as of December, 1855; but this stipulation did not cure nor excuse the delay.

It is insisted, by the learned counsel of plaintiffs, that the bringing of the suit for \$84,000 against Sherman was not a proper exercise of discretion, and that the delay in bringing the suit was unjustifiable, and the trustees should, therefore, be held responsible for all the losses occasioned by this mismanagement.

It is a general principle applicable to trustees, that when they act with good faith, and without any selfish motive, they are entitled to be treated by a Court of Equity with liberality and indulgence; and, especially, when they act under the advice of counsel. Trustees act for the benefit of others, and not for themselves, and the fair exercise of *their* judgments should be a protection to them. Very supine negligence, or willful default, will render them liable; but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking any trust. (*Garrett v. Noble*, 6 Simons, 516; *Taylor v. Benham*, 5 Haw., 285; *Thompson v. Brown*, 4 John. Ch. R., 629.)

The trustees were not to blame for bringing the suit against Sherman, as they did it with good motives, and under the advice of competent counsel. But the delay in bringing any suit to

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settle the question, from April, 1855, to June, 1856, certainly did, *prima facie*, show supine negligence. It is, however, shown that John Ellig, just before his death, in March, 1856, approved of the conduct of the trustees, after being fairly and fully advised of all the circumstances. This acquiescence on the part of the *cestui que trusts* will excuse the trustees. (*Garrett v. Noble*—before cited; 2 Story's E. J., § 1284; *Adams' Eq.*, 62; *Trafford v. Boehm*, 3 Atk., 444.) Besides this acquiescence on the part of John Ellig, there were equitable circumstances that went far to excuse this delay. The trustees charged nothing for their services, and their administration of the trust estate, considered as a whole, was beneficial to the property and greatly increased its productive value. Upon the whole, we can see no error in this part of the decree.

The Chancellor decreed that the sum allowed the trustees was a lien upon the trust property, and that, if not discharged by the plaintiffs within thirty days, execution should issue, and the trust estate be sold to satisfy the same.

It is insisted by the counsel of plaintiffs that this portion of the decree was erroneous, for the reason that the advances made by Naglee were not expended upon the trust property, or for its benefit, and, therefore, constituted no lien upon the land; that they were mere personal loans from Naglee, for which no specific lien could be decreed by the Court, but for which Ellig and wife were personally liable in an action to recover the amounts.

We think this portion of the decree too harsh, under the circumstances of the case. It seems clear that Naglee made the advances, with the understanding that they should be repaid out of the incoming rents. It was only proper to give him a lien upon the net incoming rents, including those involved in the suit of the receiver against Sherman and others. The allowance to Sharp should be a lien only upon the rents, in the same manner as the allowance to Naglee. The net rents should be appropriated to the payment of the amount of the allowances until the same are paid.

The cause will be remanded, with directions to the Court below to modify the decree in accordance with this opinion. The appellants will be entitled to the costs upon appeal.

## WARNER AND WIFE v. STEAMSHIP UNCLE SAM.

An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York *via* Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there and consequent illness, and other injuries, though based on a contract, sounds in *tort*, and the wife is a proper and necessary party plaintiff.

Such an action is confessedly based upon the provision of the statute rendering steamers liable for breaches of contracts for the transportation of passengers or property. The contract is the substantial cause of action, and the injuries received are alleged by way of special damage. The wife is, therefore, not a proper party plaintiff, and a complaint, making her a party, is demurrable.—*Per Field, J., dissenting.*

Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint, was made between the husband only and the defendants, the name of the wife as plaintiff was mere surplusage, and not a defect of parties under the Code, and might have been stricken out on notice, if insisted.—*Per Burnett, J.*

The grant of jurisdiction to the Federal Courts in admiralty cases, is not exclusive in terms, neither is its exercise prohibited to the States, nor is its exercise by the State Courts incompatible with the harmonious working of the system established by the Federal Constitution.

It is only on the distinct ground that the appellate power of the Supreme Court of the United States extends to the State Courts in proper cases, that the concurrent *original* jurisdiction of the State and Federal Courts over civil admiralty cases can be sustained.—*Per Burnett, J.*

Until the question of the exclusive jurisdiction in the Federal Courts is directly passed upon by the Supreme Court of the United States, and the jurisdiction to the exclusion of all cognizance by the State Courts, is affirmed, this Court should hesitate to declare the act of the Legislature unconstitutional, and reverse the former deliberate judgment of this Court.—*Per Field, J.*

The failure of Congress to provide for an appeal from the State Courts in civil admiralty cases, can not affect the question as to their concurrent original jurisdiction under the Constitution of the United States. If this concurrent original jurisdiction exist, the right of appeal depends upon the pleasure of Congress.—*Per Burnett, J.*

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

This was an action to recover damages for the mal-performance of a contract to transport Mrs. Warner and infant child from San Francisco, *via* San Juan del Sur, to the city of New York.

The complaint alleges a contract on the part of the agents of defendant to convey plaintiff Anne Warner, and her infant child, from San Francisco, in California, *via* San Juan, in Nicaragua, to New York, in consideration of certain money paid by plaintiff. That pursuant to the terms of the contract, plaintiff Anne embarked on board of defendant at San Francisco; but that defendant, instead of proceeding to San Juan, did, on account of some private quarrel of defendant's owners with the authorities of Nicaragua, proceed to the port of Panama, in New Grenada, where, by false representation, plaintiff was induced to disembark and proceed to Aspinwall for the purpose of taking passage on a steamer which the agents of defendant falsely represented

to have been at that place for the purpose of transporting the defendant's passengers to New York; that plaintiff was detained some two weeks in New Grenada by the acts of the defendant's agents, and put to great trouble and inconvenience, and suffering, by sickness, caused by the unwholesome climate.

Defendant demurred to the complaint for the reasons:

1. That the complaint did not state a cause of action.
2. That there was a misjoinder of parties plaintiff, the wife being improperly joined in the action.
3. That the Court had no jurisdiction of the subject-matter or of the defendant.

The demurrer was sustained in the Court below, and the defendant had judgment. Plaintiffs appealed.

*Jo. G. Baldwin* for Appellant.

No brief on file.

*Janes, Lake & Boyd*, for Respondent.

1. The wife was improperly joined as a party plaintiff.

"In general, the wife cannot join in an action upon a contract made during the marriage, as for her work and labor, goods sold, or money lent by her during that time; for the husband is entitled to her earnings, and they shall not survive to her, but go to the personal representatives of the husband, and she could have no property in the money lent, or the goods sold." 1 Chitty's Pleadings, 29; *Thorne v. Dillingham*, 1 Donio, 254.

To this rule there are exceptions; but this case does not fall within the exceptions.

But in all cases where the wife is a proper party the complaint must distinctly state the particular cause for making her a party, for it will not be presumed that any such cause exists. See cases cited in *Thorne v. Dillingham*, *supra*.

In this case, the consideration for the alleged promise moved from the husband, and the damages for any breach of the promise go to him.

2. No cause of action is stated in the complaint against the defendant, the steamship Uncle Sam.

As before stated, the contract declared on is a contract on the part of the owners, etc., of the Uncle Sam, to transport the plaintiff, Anne, from San Francisco to New York, via Nicaragua.

The action is brought under the statute providing for actions against steamers, vessels and boats. Prac. Act, ch. 6, § 317.

The clear and obvious meaning of this statute is, that a vessel shall be liable for the breach of a contract by the owners or agents *quoad* such vessel. In other words, a contract of the agent or owner, for a service to be performed by the vessel, is deemed to be the contract of the vessel, and for a failure of the

vessel to perform a service which her owners have undertaken she shall perform, the vessel is made liable in specie.

The vessel, in effect, is hypothecated for the performance of her engagements, and a lien is given for any damages resulting from a failure of performance, enforceable by action against the vessel *in rem*.

It is not necessary to consider whether an action could be maintained against this steamer for a failure to perform a voyage to San Juan, which her owners had undertaken she should perform, for the reason that the complaint makes no such case.

Both the contract set forth, and the breaches alleged, relate to the entire passage from San Francisco to New York, and damages are claimed for a violation of the entire agreement.

To narrow the case down to an action against the Uncle Sam, for a failure to perform the voyage to which she was pledged, would be to strike out the greater portion of the complaint.

For the above reasons the judgment should be affirmed.

3. But the case presents another question of more than ordinary importance, *i. e.*, whether a State Court can entertain jurisdiction *in rem* against a foreign vessel navigating the high seas.

It is not denied by the counsel for the appellants that to maintain this jurisdiction is to decide that the State Courts may be vested with "original cognizance of civil causes of admiralty and maritime jurisdiction," and, as a consequence, that the ninth section of the Judiciary Act of 1789 is unconstitutional and void.

From the time of the passage of that act until the decision of the case of *Taylor v. The Steamer Columbia*, by our Supreme Court, 5 Cal., 268, a period of sixty-five years, the exclusive jurisdiction of the Courts of the United States in admiralty and maritime causes was never disputed by any State Court. In that case, for the first time, admiralty jurisdiction in the State Courts is broadly asserted and positively maintained.

In the opinion of the Court, by Mr. Justice Heydenfeldt, reference is made to the opinion in the case of *Gordon v. Johnson*, 4 Cal., 368, delivered by the same learned Judge, as containing the reasons, at length, upon which the decision is based, and as establishing what is termed a "point of departure," which brought the Court to the conclusion to assert a concurrent jurisdiction with the Federal Courts.

This case, if it is to be regarded as of binding authority by this Court, unquestionably does determine that State Courts may be vested with admiralty jurisdiction. But we insist that this decision ought not to be adhered to.

We admit that a solemn decision upon an important question of law by the highest Court of the State should not be lightly disturbed, and not at all, except for the clearest reasons.

The Court, in *Johnson v. Gordon*, determines that the twelfth section of the Judiciary Act of 1789, authorizing the removal of certain causes from the State Courts to the Courts of the United States, and also the twenty-fifth section, authorizing an appeal or writ of error from the highest State Courts to the Supreme Court of the United States, are unconstitutional and void. The principle there maintained was, that in all cases in which jurisdiction is vested by the Constitution in the Courts of the United States, the State Courts have an equal and concurrent jurisdiction. It is proper to observe, however, that what is said in the opinion in that case upon the right to a writ of error under the twenty-fifth section of the Judiciary Act was mere *obiter dicta*.

There was no case before the Court calling for a decision upon that question.

On the 9th of April, 1855, an act was past by nearly a unanimous vote of both branches of the Legislature, for the purpose of enforcing compliance with those sections of the Judiciary Act which the Supreme Court had declared unconstitutional, and declaring it a misdemeanor for any Judge or clerk to act in contravention of them, and subjecting the offender to impeachment. Stat. of 1855, 80.

Any weight which might be attached to the case, therefore, as a legal decision, is entirely removed by this act of the Legislature, and it ought not to be regarded as of any authority whatever, unless it is supported by a weight of reasoning the most persuasive and unanswerable.

If, then, we are permitted to go behind that case, and appeal to the authority of previously adjudged cases, it would seem that this question had been settled by a weight of great names, reasoning, and legal decisions, that can rarely be found concurring upon any question that had ever been open for controversy.

The question as to the constitutionality of the twenty-fifth section of the Judiciary Act came before the Supreme Court of the United States in 1816, in the case of *Martin v. Hunter's Lessees*, 1 Wheat., 304.

The Court of Appeals of the State of Virginia refused to obey a mandate of the Supreme Court of the United States. The judgment of the Court of Appeals rendered on the mandate was as follows:

"The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this Court under a sound construction of the Constitution of the United States."

"That so much of the twenty-fifth section of the Act of Congress to establish the Judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this

Court is not in pursuance of the Constitution of the United States.

"That the writ of error in this cause was improvidently allowed under that act.

"That the proceedings thereon in the Supreme Court were *coram non judge* in relation to this Court, and that obedience to its mandate be declined by the Court."

This judgment was carried by writ of error to the Supreme Court of the United States, where the constitutionality of the act in question was fully considered and maintained without a dissenting voice.

From the time *Martin v. Hunter's Lessees* was decided till 1821, the question remained undisturbed, when it was again brought forward in the Supreme Court of the United States, in the case of *Cohen v. State of Virginia*, though in a less objectionable form than in the former case. The whole doctrine was re-examined on a motion to dismiss the writ of error, Chief Justice Marshall delivering the opinion of the Court, and the right of the Supreme Court to review the decision of a State Court was again affirmed by a unanimous judgment. *Cohen v. Virginia*, 6 Wheat., 264.

It would seem that these two decisions of the highest Court in the nation, made after full argument, ought to have put the question for ever at rest. And so it has been considered for thirty-five years, when the question is again mooted, and these solemn decisions overturned in the case of *Johnson v. Gordon*.

I do not deem it necessary to cite the numerous cases in the Supreme Court of the United States, decided subsequent to the two decisions referred to, since it is not denied that these decisions have been uniformly followed, and that a large portion of the cases constantly before that Court are brought from the State Courts, and form an important branch of its actual jurisdiction.

A case recently decided in Ohio was referred to by the appellant's counsel, in which the same doctrines are maintained as in *Johnson v. Gordon*.

But when it is borne in mind that that State, for several years past, has been arrayed in hostility to the federal government; that this hostility has exhibited itself in the legislative, the judicial, and the executive departments of that state; that actual resistance to federal authority on the part of the people is of common occurrence, and is sanctioned and encouraged by legislative enactment, and justified by judicial decision, it will readily be understood that the decision referred to is a part of a general system of resistance to the Constitution and laws of the United States which has already led to the verge of civil war.

But if this Court is not prepared to overrule the case of *Johnson v. Gordon*, still we maintain that it does not follow that the decision in the case of *Taylor v. The Columbia* can be supported.

The two cases are not at all parallel, and are not supported by the same line of argument.

The former case was the revival of an old political controversy, not in regard to the jurisdiction of the State Courts, but in relation to the independence of the State Courts.

The case of *Cohen v. Virginia* was argued on the part of the State of Virginia by Mr. Barbour and Mr. Smyth, than whom no more eminent names were known at the bar, and both disciples of what was termed the extreme State Rights school. It will not be pretended that they yielded to Congress or to the Federal Judiciary the right to exercise any powers which offered the least room for contest; and while much is said in their arguments in regard to concurrent jurisdiction, yet the whole contest was, to shake off the appellate authority of the Supreme Court of the United States over the State Courts, by which the State Courts were rendered inferior, and, as was urged, were consequently humiliated.

The ninth section of the Judiciary Act declares, that "the District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.

The question is, whether this section of the Judiciary Act is constitutional?

The acquiescence in the constitutionality of this section of the Judiciary Act has been even more uniform and universal than that under the twelfth and twenty-fifth sections, and for the reason that there is less room for questioning it.

In the case of *Martin v. Hunter's Lessees*, the Court of Appeals in Virginia did not deny that the jurisdiction of the Courts of the United States was or might be made by Congress, exclusive of the State Courts. It simply denied the constitutionality of the particular mode in which jurisdiction was exercised in that case—namely, by writ of error to a State Court, which was deemed degrading to the State Court.

The argument was, and it was admitted by Judge Story not to be without force, "that the Constitution was imperative upon Congress to vest all the judicial power of the United States in the shape of original jurisdiction in the Supreme and inferior Courts created under its own authority;" and in the case of *Cohen v. Virginia*, one of the counsel for the State, while he did not concede in terms the proposition as broad as above stated, yet enumerated cases of admiralty and maritime jurisdiction as necessarily within the exclusive cognizance of the Federal Courts.

And Mr. Justice Johnson, in *Martin v. Hunter's Lessees*, (1 Wheat., 372,) says that: "The real question is, whether the State

tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends."

"With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the States could resume it, if the United States should abolish the Courts vested with that jurisdiction."

These views are entitled to the more weight as emanating from a judge whose political opinions, like those of the counsel in *Cohen v. Virginia*, were known to be of the strict State Rights school.

In 2 Story's Commentaries on the Constitution, it is said (§ 1672) that "the admiralty jurisdiction naturally connects itself on the one hand with our diplomatic relations, and the duties to foreign nations and their subjects, and on the other hand, with the great interest of navigation and commerce, foreign and domestic; there is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which can not be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home."

This exclusive jurisdiction is affirmed by the Courts of the United States in the following cases: *Slocum v. Mayberry*, 2 Wheat., 9; *Gelston v. Hoyt*, 3 Wheat., 246; *The Barque Chusan*, 2 Story's R., 455; *Waring v. Clark*, 5 Howard, 461. And a recent case in the District Court of Missouri, reported in the January number of the American Law Register, which will be presently more fully referred to.

There was no claim on the part of the appellant's counsel to uphold jurisdiction in the case at bar under the exception in the statute which gave to the suitor a common law remedy when the common law is competent to give it. The learned counsel, in his argument, as in his opinion in *Taylor v. The Columbia*, manifested no inclination to shrink from the responsibility of directly assailing the validity of the Judiciary Act, and asserting a broad admiralty jurisdiction.

It is proper, however, to consider what that common law remedy is which is saved, not given, and whether it embraces this case?

At the time of the adoption of the Constitution and the passage of the Judiciary Act, the admiralty jurisdiction was not clearly defined, and there was much conflict of opinion concerning its extent. There was a class of cases in which the admiralty in England sometimes claimed and exercised jurisdiction in *personam*, in which an action of trespass, case, or *assumpsit*, was maintainable at common law. And the Common Law Courts frequently interfered by writ of prohibition, to restrain the Courts of Admiralty from taking cognizance of such cases.

This controversy has been revived in this country, and per-

haps can not be yet be regarded as entirely settled, although it has been determined that Courts of Admiralty are not confined to the narrow limits to which they were restricted in England by the jealousy of the Common Law Courts. *De Lovio v. Boit*, 2 Gallison, 470.

Congress, in framing the Judiciary Act, while it did not attempt to define the extent or limits of admiralty jurisdiction—leaving that question for the decision of the Courts under the general principles of maritime law—was careful to leave in the Common Law Courts all the jurisdiction that they had theretofore exercised.

To this no reasonable objection could be foreseen, since from the organization and construction of the Common Law Courts as Common Law Courts, it was not possible for them to extend their jurisdiction to cases which had been theretofore within the acknowledged exclusive jurisdiction of Courts of Admiralty in England. Hence the Common Law Courts, by the exception in the ninth section of the Judiciary Act, retain the same common law jurisdiction over the class of cases above referred to, which they possessed at the time the Constitution was adopted. 1 Kent Com., p. 377, note.

But the causes of admiralty and maritime jurisdiction which had theretofore never been entertained by the Courts of Common Law, but had been taken cognizance of exclusively by the Courts of Admiralty, were committed exclusively to the Federal Courts; and the constitutionality of this exclusive jurisdiction was not questioned even by Mr. Justice Johnson, in an opinion in which he exhibits no little jealousy of the jurisdiction of Courts of Admiralty. He says: "I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions." *Ramsey v. Allegre*, 12 Wheat., 611.

It must be borne in mind that the question in this case is not, however, whether the Courts of Admiralty have grasped at too much jurisdiction, but whether a Court of Common Law can assume new jurisdiction heretofore only entertained in the admiralty.

On this point of a common law remedy we are saved much labor by the very elaborate examination of the question in the case of *Ashbrook v. The Golden Gate*, by the Judge of the U. S. District Court for the District of Missouri, above cited. Jan. T., Am. L. Reg., 148.

In the case at bar, the steamer *Uncle Sam* is confessedly a vessel navigating the high seas, and owned out of this State, and hence a foreign vessel.

She is proceeded against *in rem*, not by common law action, but under a statute which purports to give this special remedy, unknown to the common law. Any judgment that may be re-

covered is intended to operate directly on the vessel. She must be sold to satisfy it.

The appellant's counsel was quite right in conceding that it was, to all intents and purposes, an admiralty proceeding. So the case of *Averill v. The Steamer Hartford*, decides, (2 Cal. R., 308,) and so the case of *Taylor v. The Columbia* reiterates. He contends that all this follows the first "departure," in *Johnson v. Gordon*.

The "departure" declared the twelfth and twenty-fifth sections of the Judiciary Act unconstitutional. The second departure, *Averill v. The Steamer Hartford*, *supra*, vested the State Courts with admiralty jurisdiction *pro tanto*; and the third "departure" declares the ninth section of the Judiciary Act also unconstitutional, and vests the State Courts with full admiralty jurisdiction, not *pro tanto*, but *in toto*.

What is to be the effect of holding to this jurisdiction? However important the questions involved in *Hunter v. Martin's Lessees*, and *Cohen v. Virginia*, it has fortunately happened that very little practical evil has resulted, or is likely to result, from them. But on this question of conflict concerning admiralty jurisdiction, the mischievous consequences are immediate and inevitable.

In attempting to seize vessels under State and Federal process, collisions must frequently occur between marshals, sheriffs and constables. Where is the conflict to end? Neither Court could claim a victory in such a contest, where the inevitable consequences must be to degrade both.

It is not too late to retire from a controversy which we submit was most needlessly commenced, and return to the "point of departure."

Whatever doubts were once supposed to exist as to the wisdom of entrusting to the Supreme Court of the United States the interpretation of the Constitution and the construction of laws passed under it, the experience of sixty-seven years has served to dispel them. The wisdom, learning, integrity, independence, and firmness which has so eminently characterized that bench, have won for the Court the confidence of the whole nation.

In times of the highest political excitement, the people look to it as the only hope of safety, and private opinion is ever ready to yield to its judicial determinations.

The continuance of its usefulness must mainly depend upon the respect with which its decisions are received by the State Courts.

*Jo. G. Baldwin* in reply to Respondent's argument.

I differ from the learned counsel upon two points: 1. The construction of the act. 2. The matter of exclusive jurisdiction

of the Federal Courts, and, therefore, of the constitutionality of the State law.

The counsel think it clear that the vessel, under this law, can only be answerable for the part of the contract to be performed by the vessel, for this is the plain English of the proposition. But this, we submit, can not be; for that would be to say the vessel, in such a case as this, could not be made responsible at all, since a contract is an entire thing, not divisible or capable of being divided. There can be no enforcement of a portion of a contract. The vessel must be bound for the whole contract, or none. It is true that the vessel was not to complete the whole transportation of the passengers. But the agents undertook to transport them by means of this vessel and others; the vessels were the mere vehicles by which the contract was to be performed; and each of these vessels is responsible for this duty. This answers as well the necessities of the case as the language of the law: "All vessels shall be liable for non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, masters, agents, or consignees."

These words certainly do not limit the responsibility of a vessel doing the entire work of transportation when it is considered that the greater portion of contracts of this sort was made by steamers plying between San Francisco and the Central American ports, no one vessel performing more than a part of the service of transportation to the Atlantic ports. This construction may readily be presumed to have been within the view of the Legislature. Nor is there anything unreasonable in this; especially when the vessel sought to be made liable belongs to the same company that made the contract. The company is unquestionably responsible for the violation of the contract; and I know of no rule which forbids a plaintiff, if the Legislature chooses so to direct, from serving process on the servant or agent of a company, or attaching its property, to answer for a violation of its contracts, any more than by proceeding against it to judgment, by publication.

I shall as briefly as possible proceed to argue the question of jurisdiction. It is admitted that this very question has been heretofore decided by the Supreme Court.

That decision is assailed. Since that decision, many cases have been brought in the State Courts, and rights vested under them; and so the evils of disturbing rights which the doctrine of *stare decisis* deprecates are involved in the reversal. Besides, the jurisdiction of the State Courts over these matters is, particularly at this time, very important; the delay and expenses of the Federal Courts, especially when great monopolies are concerned, able to carry cases to the Supreme Court of the United States, make litigation in those forums almost a denial of justice. It

seems to me, therefore, that this Court would at least wait for an authoritative decision of the Supreme Court of the United States before it declared the act of the State Legislature unconstitutional, and reversed its own decision upon so important a matter to its citizens. Even were there a clearer exposition of the soundness of the counsel's propositions than appears.

In the first place, it may be remarked that the contract of transportation made by the company might be enforced at the common law, for all we can see, like any other contract of a common carrier. We do not see, nor is it contended to the contrary, that the company might not have been sued *ex directo* in the Courts of California for a violation of its contract to convey freight or passengers, the contract being made in this State. The general power exists in the State Legislatures—authority to prescribe the remedy for contracts; nor is it easy, within certain obvious restrictions, to impose limits on this power. It is not perceived why a contractor shall be by name made defendant, if he is authorized to come in to defend, and has notice to defend—the law fixing what that notice shall be. If the action of replevin were an action by the owner or deplisa against the thing deforced, with notice to the deficar, or his his bailee, it is not seen why this would not be as good a suit at law as any other. True, there must be parties, but those parties may be made indirectly as well as directly, in one form or another—at one time as well as another. The mere title of the suit is nothing; the real controversy is a suit between persons waiving their claims to property or money; nor is the fact that the Legislature adopts the forms of Courts of Admiralty important. It may mould the proceedings to suit itself after any old system of practice, or make a new one. Attachments are held to be proceedings *in rem*, to sales of estates of decedents and for forfeitures, etc. And these partake in some degree of the admiralty system. Nor does the fact that a lien is given on the property, invalidate the law or the proceedings. The Legislature may make a suit a lien if it chooses, as it does in some State cases, just as well as a judgment. If, therefore, the State has jurisdiction, legislative and judicial, over contracts and remedies, and these relate to a contract to be performed on the water or elsewhere, as well as here, or partly performed here and partly elsewhere; and if they may mould these remedies to suit themselves, it follows that a law authorizing a vessel to be sued on notice to the owner or his bailee, will be within the competency of the Legislature. The right of a State to create a lien on vessels has not, we believe, been denied; the right has been often exercised; the question has been whether the United States Courts would enforce the lien beyond the State jurisdiction.

We understand the learned counsel to contend that the claim is within the admiralty jurisdiction of the United States, there-

fore, that jurisdiction is exclusive. This we deny; the second article of the Constitution provides that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; also, between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subject.

And yet, in every one of these cases, without exception, the jurisdiction of the United States Courts has been held not to exclude that of the State Courts, with the single exception of the admiralty and maritime jurisdiction, if that be an exception. How is this? How does it happen that the same words, applied to one class of cases, do not apply to another? It will not do to say that the United States permits the State to entertain jurisdiction in these other cases, for, if the Constitution excludes it, Congress could not permit it. Indeed, the act of 1789, authorizing the removal of cases from the State Courts, implies the jurisdiction of the State Courts, with a mere right to have a trial in the Federal Court; for, if the State Court had no jurisdiction, its proceedings would be void, but, so far as they go, they are held valid. We say, therefore, that if the act of Congress be, as it ought to be, construed by the counsel, it is unconstitutional in this: that it gives an exclusive jurisdiction to the Federal Courts, of that which is equally within the cognizance of the State Courts. But, is it to be construed so? When the act in the ninth section speaks of the exclusive original jurisdiction of the District Courts, does the word "exclusive" refer to other Courts of the United States, or does it refer to the State Courts? Is it not a mere term of definition of the powers of the different Courts of the United States? But, if we are wrong as to this, then we say this case is within the saving of the act of 1789.

That act saves from the "exclusive operation of the act," in all cases, the right of a common law remedy, when the common law is competent to give it. The origin of and the necessity for this proviso, are well explained in the case of *Cashmen v. De Woolf*, in 2 Sandford Sup. C. R., 388. The Court say: "The Constitution authorizes Congress to create inferior Courts, and confer on them admiralty jurisdiction. Until Congress exercised the authority, there was no interference with the State Courts, and where the United States District Courts were created, and their cognizance defined, their jurisdiction became exclusive only so far as it was made exclusive by the act of Congress. In all other cases where the Courts of Common Law provided an adequate remedy before, it seems to be plain that the Judiciary Act at most gave only a concurrent remedy to the admiralty.

Now, it is perfectly clear that the common law in this case did

provide an adequate remedy before suit might have been brought upon the contract of transportation.

Therefore, the jurisdiction over the subject was not taken away from the State Courts. They had it before; they have it now. This is all we want. As to the mode in which the State Courts shall exercise their jurisdiction, as we argued before, this is wholly unimportant. We are discussing a question of jurisdiction, not a question of practice.

The Constitution and the acts of Congress deal with things, not forms. The object, evidently, was to give to the Courts of the United States only such exclusive jurisdiction, of admiralty or maritime matters, as was denied by the English to the Common Law Courts. When the Common Law Courts had jurisdiction before, they were to retain it. They had jurisdiction before of just such cases as this. The case in 2 Sandford was an equity case, a case of salvage, too, not a case having a common law remedy at all, but it fell within the principle just announced. The word "remedy" is not to be taken as Judge Lake supposes, in its technical sense, as contradistinguished from right. It means merely a legal cause of action, for it would be absurd to suppose that Congress intended to make jurisdiction dependent upon a mere process of practice; if so, Louisiana could never have obtained the benefit of it at all, as she had no common law remedies. The sense of the thing is simply this: when, at common law, an action laid there, admiralty questions were concurrent in the United States and the Common Law Courts; when it did not lie, the jurisdiction, (as in prize cases,) was exclusive in the Admiralty Courts, then the Admiralty or United States Courts had exclusive jurisdiction.

The Court is invited particularly to examine the case in Sandford, and the argument of D. Lord, in illustration of this view of the subject. See, also, 16 Johns., 328; 18 Johns., 291; 6 How., 389; 15 Irvin, 173; 1 Baldwin, C. C., 544; Gilpin, 191; 10 Wheat., 428; 2 Gall., 307; 2 Story, 455; Ware, 91.

If this principle be established, it follows conclusively that this State has a right to its jurisdiction over this subject; that this being so, it could have exercised it by proceeding *in rem* or *personam*, in admiralty form, or civil law form, or any other form it chose; it was a common law right, and the mere process of working out that right is wholly unimportant, so far as the question of jurisdiction is concerned.

I have seen no case which maintains the exclusive jurisdiction of the United States Courts. Those cited by the respondent do not, according to my reading of them.

The contest among the Federal Judges seems to have been not as to the exclusive jurisdiction of the United States Courts in admiralty cases, but as to the fact of that jurisdiction in particular cases. Story and Wayne, taking extreme federal ground,

and Baldwin, Daniel, Woodbury, and others, opposing, this contest seems to be still going on. See, 17 and 18 Howard, or refer the Court to the able and learned opinion of Judge Woodbury, in 6 Howard. The feeling has been general in the State Courts, and with the ablest members of the Supreme bench of the United States, that the Federal Courts have stretched the jurisdiction in admiralty to the point of usurpation; and we do not think this Court will be disposed to carry it further than they have gone. 2 Wheat., 3 H., 2 Story, 5 Howard, it is submitted, do not establish the doctrine of exclusive jurisdiction.

The decision of the District Judge of Mississippi is no authority, and is opposed by the case in 2 Sandford. The reasoning is too narrow and technical.

It is submitted that, as an original question, the doctrine of *Gordon v. Johnson* is correct, that to "extend jurisdiction" to the Federal Courts is not to exclude a pre-existing jurisdiction; that, therefore, the latter jurisdiction is concurrent with the former; that it is a rule of concurrent jurisdiction; that the forums of each are equal in power, and this is the rule of sovereignty. Hence, the Courts of the United States could not take jurisdiction away from the State Courts. In a particular class of cases it has been held that the doctrine is not sound, but it has not been so held by the Supreme Court of the United States in this class of cases. Even if this Court holds itself bound by the decisions of the Supreme Court, so far as they have gone, it does not follow that it will go any further. If they follow the Supreme Court, it is because of the authority—not of conviction, if this Court agrees with us in this respect.

But we think, independently of this view, that the law of the State Legislature is constitutional, because, mainly, the right to sue was a common law right, and the act a mere change of remedy, which it was always competent for the Legislature to make. To hold otherwise would be to hold that every change, or any change of remedy, ousted jurisdiction.

BURNETT, J.—The first ground of demurrer was that the Court had no jurisdiction, for the reason that the defendant was a foreign vessel, engaged in navigating the high seas, and not liable to be sued in a State Court. In the case of *Taylor v. The Steamer Columbia*, (5 Cal. Rep., 268,) this Court decided that the judicial power of the Courts of the United States, in admiralty and maritime causes, was not exclusive; that the States have the power to confer upon their Courts all admiralty and maritime jurisdiction, and that Congress has no power to make this jurisdiction *exclusive* in the Federal Courts. The decision in that case referred to, and relied upon, the opinion in the case of *Johnson v. Gordon*, (4 Cal. Rep., 368.)

The learned counsel for the defendant asks us to review these

decisions, heretofore rendered by learned judges who are not now members of this Court. In making this request, he concedes that "a solemn decision, upon an important question of law, by the highest Court of the State, should not be lightly disturbed, and not at all, except for the clearest reasons." That distinguished commentator on American law, Chancellor Kent, has said :

"It is probable that the records of many of the Courts in this country are replete with hasty and crude decisions, and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

But it can not, with any reason or justice, be said that the decisions in the two cases of *Johnson v. Gordon*, and *Taylor v. The Columbia*, were either crude or hasty. That they were well and solemnly considered, is apparent from the opinions delivered, and the nature of the questions determined. We, therefore, undertake this duty with a full sense of the great responsibility imposed upon us, and with a due respect for the opinions of the learned jurists who formerly filled this bench.

The first question arising in this case is this : What tribunal, if any, in the contemplation of our system, has the right to construe the Constitution and laws of the Union, in the *last resort* ?

The ratification of the Constitution of the United States was the act of each State, acting for itself, as a sovereign and independent body. The Constitution was not adopted by the people of the United States, as individuals composing one entire nation, but as composing distinct and independent communities; each individual belonging to only one of these independent sovereignties. Each State had the *exclusive* right to ratify or reject, without any regard to the extent of its territory, or the number of its population. Each State acted as an independent equal, and as a distinct unit. For this reason the Constitution might have been rejected by a majority of the whole people.

But is the fact that the Constitution was *thus* ratified by sovereign States, each acting separately and independently of all the others, any evidence of the character of the government *thus* formed ?

It would seem to be true, that although the States acted in this manner in ratifying the Constitution, they still had the right to give to the Government they created such form and character as they pleased. They could have made it a national or federal government; or a government of mixed character. We will suppose, for the sake of the argument only, that they intended to constitute a strictly national government. Being sovereign States, already in existence, and intending to merge their

entire powers in one national government, they could only do this in one of two modes; either by adopting the method of ratification by States, or by dissolving themselves into their original elements, and thus permitting the people, as members of but one political community, to form their own Constitution.

If we are correct in these views, it follows that the *manner* in which the Constitution was ratified by the States is no evidence as to the character of the government in fact created by the Constitution; and we must look to the instrument itself, and learn from its language the nature of the powers conferred, and the ends contemplated by the system, to ascertain where that judicial sovereignty is placed—the right to decide in the last resort. As the States had the right to cede their entire powers to the government they created, they had the right to cede a part; and if a part, then they had the right to cede to the new government the highest attributes of sovereignty, the exclusive right to determine its own powers under the Constitution. And it may be that there existed the most ample reasons for giving this power to the federal government, as it must, of necessity, be placed somewhere.

The ends contemplated by the framers of the Constitution, as stated by the instrument itself, were these: To form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to the American people and their posterity.

It would seem, therefore, to be true, that the federal government was intended to reach and act directly upon the *individual* citizen. For this reason, it is in truth a government, and not a mere confederation. The great and radical defect in the old confederation was, that it acted upon artificial and not upon natural persons. In the theory of our American systems, laws are made, interpreted, and executed, by the whole people acting as an entirety, but are generally executed upon individuals, in their capacity as such. For when laws are enacted, interpreted, and executed, by the proper *organs* of the people, they are made, interpreted, and executed as the act of the whole, although these organs are only chosen or appointed by a portion. Where the powers of government are exerted upon separate individuals, their operation, from the very nature of the case, is much more easy, practical, and efficient, than when they are operative only upon large and combined masses of men.

It is true, that in some respects, the powers of the federal government are exerted over the States as such; as, for example, where a controversy exists between two or more States. For this and other reasons the federal government is, in the language of Mr. Madison, "of a mixed character." (Federalist, No. 39.)

It would also seem clear that the Federal and State governments must constitute but *parts of one entire system*; and, if parts of an entire system, it must have been intended that they should operate harmoniously, without any essential discord. This must have been so from the fact that the same people and territory were to be governed by both. As both governments were to operate peacefully, and yet efficiently, upon the same individuals within the same territory, it must have been intended to give the system some logical consistency. And whatever theory was adopted was intended to be practical, as well as beneficial, in its *actual* results. Governments can only be intended for practical purposes. There could be no other end contemplated by the founders of any government. The influence and power of government must be felt in the daily affairs of life.

As all the powers of government were intended, by the framers of the Constitution, to be divided between the Federal and State governments, it was necessarily their duty to mark the line of separation between the two, as plainly and distinctly as possible. But, as Mr. Justice Johnson so well remarks in his opinion in the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 374, "language is essentially defective in precision." This being the true *general* character of language, the framers of the instrument were compelled to convey their intentions through a defective medium. And not only so, but they were compelled to provide, in *advance*, for all future cases. This they could only do by laying down *principles*. The Constitution, from its nature as a concise and fundamental law, could only deal in general principles, expressed in general terms. It was impossible to anticipate all the future contingencies which might, or might not happen, and to make minute and exact provisions for each possible case.

From the very nature of the case, the wise statesmen who framed the instrument must have anticipated that the most difficult questions would arise, as to the true nature and extent of the powers conferred upon the federal government; and, by consequence, of those reserved to the States. Not only were the powers of the federal government limited, but those of the States were also limited; and the powers of both, taken together, were still limited; so that questions of grave difficulty must have been foreseen, not only as regarded the proper distribution of powers between the two different systems, but also as regards the limits of the powers granted to each, and to both.

The invincible necessity, therefore, of some tribunal to settle, *peacefully and finally*, these difficult questions would seem to be apparent. And it would seem equally clear, that this power of deciding in the last resort, must, of necessity, be placed in the highest tribunal, either of the federal government, or of each State, and could not be confided to *both*. We could as readily

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conceive of two or more Supreme Deities governing the same universe, as of two or more Supreme Courts construing the same code of law for the same people. There could be no unity, peace, or practical efficiency in such a system, if it could properly be called a system at all. It would leave the Federal and State governments always in conflict, with no power to determine the questions between them. It would be "without form and void," and "darkness" would be "upon the face" thereof.

In which government does this power reside? Is it confided to the Supreme Court of the United States for the whole Union? or to the Supreme Court of each State for the benefit of each State?

In the case of *Cohens v. The State of Virginia*, 6 Wheaton, 381, Chief Justice Marshall said: "The general government, though limited as to its objects, is supreme with respect to those objects. This principal is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority."

That the powers of the federal government, though limited, must be supreme within the limits prescribed, is not only evident from the general nature of the powers themselves, but from the extent of their operation, and also from the express provision of the Constitution itself, that "this Constitution, and the laws of the United States, which shall be made, in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding."

It must, we think, be conceded that this "supreme law of the land" was intended to be supreme *as construed and applied* by the proper tribunal. In other words, it was not to be supreme *solely* in its dead letter, but in its practical construction. Its supremacy was not to be alone admitted in name, but in fact. For this reason, the Constitution provided that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish."

There is but one Court created by the Constitution itself; but that Court is made supreme. The Constitution then defines the limits and extent of the judicial power itself: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made under their authority," etc.

In reference to the *extent* of the judicial power, Chancellor Kent has said: "The judicial power in every Government must be co-extensive with the power of legislation. Were there no power to interpret, pronounce, and execute the law, the Gov-

ernment would either perish through its own imbecility, as was the case with the old Confederation, or other powers must be assumed by the legislative body, to the destruction of liberty." 1 Kent, 296.

The Supreme Court has both original and appellate jurisdiction. Its original jurisdiction depends upon the character of the parties, and not upon the subject-matter of the controversy; while its appellate power extends to all the other cases mentioned, including "all cases in law and equity, arising under" the Constitution, treaties, and laws of the Union. The power of the federal judiciary is not only co-extensive with the legislative, but goes beyond it, and embraces all cases affecting certain parties, whether the controversy arise under a law of the Union, or under a law of a State. It is therefore evident, from the character and the extent of the judicial power given, that great confidence must have been reposed in the Supreme Court of the United States by the framers of the instrument.

As the laws of the federal government are made by the Constitution the *supreme law of the land*, and as the judicial power of the same government extends to *all cases*, in law and equity, arising under *this law*, and as no right of appeal is given, it would seem to follow, as a necessary logical result, that the determination of the highest tribunal created by this *supreme law*, must be final and conclusive upon all. The government, whose law is supreme over all, must provide its *own* tribunal to construe its own law in the last resort. If the law be supreme, the highest tribunal created by that law must be also supreme. If the law be supreme over the Constitutions and laws of the States, then it would seem a necessary result that the interpretation of this law by the highest tribunal created by the law itself, must be equally supreme over the Constitutions and laws of the States. The government in which the supreme law is found, must, of necessity, possess the highest attribute of sovereignty—the exclusive right to determine its own powers under the Constitution. Without this power, it is difficult to conceive how such a government could properly be called supreme. To say that the law of the Union shall be supreme—that the jurisdiction of the federal judiciary shall embrace *all cases*, in law and equity, arising under it; and yet to say that the decision of such questions is not conclusive in the contemplation of such a theory, is to say that which would seem to be contradictory, inconsistent, and, therefore, untrue.

If we are correct in the position that the supreme law was intended to be such, when construed by the proper tribunal, then it would seem to follow that this construction was intended to be uniform—that the same law, as actually *construed and administered*, should be the same in every part of "the land" over which it assumed to be the supreme law. That this end was contem-

plated by the framers of the Constitution, seems not only to flow from the nature and reason of the case, but from the organization of *one Supreme Court*. It seems difficult to conceive of any other adequate motive for the creation of this tribunal. To carry out this intent, the appellate power of the Supreme Court is made to embrace all the cases specified. This appellate power is not confined to the decisions of any specified inferior Courts, but is general, and only limited to the *cases* mentioned. The Congress has full power to establish *inferior Courts*, but only *inferior Courts*. And though the judicial power is vested in the Supreme Court, and in such inferior Courts as Congress may establish, it does not follow, from this fact, that the appellate power of the Supreme Court is thereby confined alone to those inferior tribunals. For if this were true, the very end and object of the Constitution in establishing this one Supreme Court would be substantially defeated. It would leave each State tribunal to determine conclusively its own jurisdiction, and to make a final construction of the law of the entire nation. And the language of the Constitution, that this *appellate* power shall extend to *all the cases* mentioned, could not be true. When the appellate power is extended to *all cases*, in law and equity, arising under specified laws, it must, from the very nature of appellate power, be supreme over all such cases, whether they arise in a State or Federal Court. The power is given over the *case* wherever pending.

But if we take the theory that the Supreme Court of each State has the right to construe the Constitution and laws of the Union, in the last resort, to be true, for the sake of the argument, it would seem to defeat, substantially, all the ends contemplated by the Federal Constitution. It was certainly supposed, by the framers of the Constitution, that the powers of the federal government were of paramount importance; and that the ends to be accomplished by their exercise were necessary to national and individual happiness. How these powers could have the same uniform and beneficial operation over the entire Union, when the instrument conferring them, the treaties made, and the laws passed under it, must be subjected to the final, and yet conflicting, interpretations of an indefinite number of supreme State tribunals, it is difficult to conceive. Here is a law declared by the Constitution itself to be supreme over a given territory; yet, if this theory be true, it was originally subjected to the independent interpretation of thirteen, and now of thirty-one, Supreme Courts, each giving a final conclusive decision within the limits of its own territory. This government, assuming to be supreme over the entire nation, and with laws declared to be so, is allowed only that power in each State which the Supreme Court thereof may permit. In the contemplation of this theory, the federal government is only supreme in name and

pretension, but not so in truth and fact. It has the shadow, but not the substance of supremacy—the form, without the power. It is the servant of many independent masters, with different wills and dispositions. And if it be true, as insisted by the learned Judge who delivered the opinion of this Court in the case of *Johnson v. Gordon*, that uniformity of opinion “is incompatible with the known characteristics of the human intellect,” it would seem to constitute the most evident and forcible reason for rejecting the theory that submits the same law, intended to be equally supreme everywhere throughout the entire Union, to the construction of so many different supreme tribunals. And, therefore, if uniformity of decision be substantially attainable at all, it can only be had under the decisions of *one* Supreme Court.

If this theory be true, it would be the duty of this Court to prevent the exercise within this State, by the federal tribunals, of all jurisdiction, which we, in our opinion, might judge to be unauthorized by the Constitution of the United States. And, as neither the Constitution of the United States, nor the laws of this State, provide any mode for taking an appeal from the federal tribunals to this Court, the only way in which we could enforce our decisions would be to restrain the parties, or the officers who were sent to execute the judgment. If the right belongs to us, and not to the Supreme Court of the United States, to construe the laws of the nation, in the last resort, then a decision by that tribunal, in a case where we should think it had no jurisdiction, would be void, and could not be enforced in this State by any federal officer. And it would be very questionable, under this theory, whether a decision, based upon a construction of an act of Congress, which we might think unconstitutional, would be binding and conclusive upon the parties. As no mode of direct appeal is provided, and no time specified within which it must be taken, there could be no negligence on the part of the party against whom the judgment was given, and for this reason he might be allowed to resist the enforcement of the judgment itself.

The practical result of this theory would seem to render the general government wholly incompetent to accomplish the great ends intended and to make it as feeble and imbecile as the old confederation. For, while the federal government would be ostensibly allowed to act directly upon individuals, its action would be subjected to the restriction of thirty-one Supreme Courts, whose duty it would be to protect these same individuals from that which each of these Supreme Courts should determine to be the usurpation of the federal judiciary. If the supreme right to determine the construction of the Constitution and laws of the Union in the last resort, resides in the Supreme Court of each State, then this right must be efficiently exerted in all proper

cases in *some form*. It would be idle to possess the power and not to use it when required.

There can be but little essential difference, *in principle*, between confining the action of the federal government solely to *artificial* persons, and permitting this action to extend to *natural* persons, while at the same time these artificial persons have the right to restrain such action, when, in the opinion of their agents, it should be done. The difference in the two cases is only the difference between action and non-action. But the power to defeat the action of the federal government is the same in both cases. In one case it requires action to accomplish the end, while in the other, it is done without action. "The requisitions of Congress," says Chief Justice Marshall, (6 Whea., 388,) "under the confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety."

It is most cheerfully conceded as true, that under no theory can entire continued practical uniformity of decision be attained. This is owing to an inherent infirmity in all human institutions, and arises from two main causes:

1. That the appellate tribunal can only act when parties choose to take a case up before it. From this cause, a want of *temporary* uniformity may be found, but the means of obtaining *ultimate* uniformity always exist.

2. The same appellate tribunal may overrule its own decisions, in some cases.

But although entire uniformity can not be attained, substantial uniformity is the end sought, and this can be reached. The main object of organizing the Supreme Court of this State, was to produce this substantial uniformity of decision. True, we occasionally overrule some of our former decisions, but still the great mass remains untouched. The same object was intended to be accomplished by the organization of one Supreme Court of the United States.

And there would seem to be a great difference between substantial uniformity and substantial confusion. Suppose no one Supreme Court had been created by the Constitution of this State, and each District Court had been allowed to make a final decision, what would have been the inevitable result? If we take all the different constructions of the Constitution and laws of the Union, to be found in the records of the Supreme Courts of the different States, from the organization of the federal government to this time, the state of confusion and conflict will be apparent. And it must be conceded, that this confusion and conflict would have been much greater, had the State Supreme Courts proceeded from the beginning, upon the ground that they had the right to interpret in the last resort. But as they have generally followed the decisions of the Supreme

Court of the United States, much of this confusion has been avoided. And if we examine the decisions of that august tribunal, we shall find very few substantial discrepancies. Few former decisions have been overruled; and the system of Federal and State governments, as shown by these decisions, is logical, practical, and beautiful in every feature. And conceding that no absolute uniformity be attainable, it is not perceived why we should not approach as near to it as may be. Human efforts are never more than substantially successful. The criminal laws of a State never can entirely suppress crime; but this constitutes no good reason for abolishing them. There is an almost immeasurable distance between the best and the worst man; and yet the best is not perfect. And because an individual can not be free from *all* faults, is it any reason why he should not use every proper means to correct those he has?

It may be, as it has been urged against the right of the Supreme Court of the United States to be the final interpreter, that "the concurrence of this department with the others in usurped powers might subvert for ever and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve." Mr. Madison's Virginia Report, January, 1800, cited 1 Story on the Constitution, 259.

The entire problem of government has always been found one of great difficulty, notwithstanding the long and continued experience of mankind. In reference to many points, there is ample room left for differences of opinion; and that, too, among men of the most acute and generous minds. But though investigation and time may not have settled all doubts, in reference to every point, there would seem to be, at least, some positions substantially established by common sense and common experience. Among the positions that would seem to be settled, are these: that a certain measure of power is invincibly necessary, and must be bestowed upon government; and when bestowed, must be placed somewhere; and all that can be done, is to give the power with proper checks and balances to prevent abuses. Government can not exist at all without power; and wherever power exists, it may be abused. And after all that has been, or can be said, it comes at last to this: that we must, of necessity, choose one of two things—either the non-existence of government, or the chance of abuse. It may also be assumed as true, that under no possible system, can the powers of government be so guarded as entirely to remove the opportunity of abuse. This we must anticipate to a certain extent.

The theory of the Constitution of no government ever contemplates revolution. It is, however, true, that they all assume to be perpetual; and where a Constitution provides no mode for its own amendment, the right of revolution is the only remedy. Our Constitutions, both National and State, provide a mode of

amendment; and this right of constitutional and peaceful amendment, is the proper remedy against abuses, when other peaceful remedies fail. The Judges of the Supreme Court of the United States are appointed by the President of the United States, by and with the advice and consent of the Senate. The President himself is elected every four years, not in form, but practically by the people themselves. It is true, he may be at times elected by a minority of the whole people, but this can not be the general result. From the number of the Judges, and the manner of their appointment, they must, as a general rule, be men of the first character for ability and integrity, and taken from different sections of the Union. Under these circumstances, it would seem the power of final interpretation is most safely and properly lodged in that tribunal. For if we take the other hypothesis to be true, that this power resides in the Supreme Court of each State, there it is equally, if not more, liable to abuse; and the result of this abuse must lead to equal individual oppression, and much greater national confusion.

Every consideration would seem to lead us to the conclusion that the framers of the Constitution reposed this power of final interpretation in the Supreme Court of the United States. We can well conceive of a division of powers between the State and Federal governments. But we can not conceive of an equal division of strict sovereignty between the two systems. Sovereignty is a unit that can not, in its very nature, be divided. It must reside with only one party; and the highest ultimate right to determine the limits and powers of each, must belong to that government with which is found the supreme law of the entire nation.

That the utmost confidence was reposed by the framers of the Constitution in the Supreme Court of the United States is apparent, not only because its appellate power was extended to all cases, in law and equity, arising under the laws of the nation, but because of the original jurisdiction vested in this Court in reference to controversies existing "between two or more States." In these cases, one or more States are required to appear before this Court at the suit of one or more of the other States. They appear *as parties* before a Court whose decision is final and conclusive upon them. In these cases, the Court does not act in the mere capacity of a mediator, or as a friendly adviser. Neither party has a right, in the contemplation of the Constitution, to reject the decision upon the ground that the Court has usurped jurisdiction, or erred in any other way, in rendering the judgment. But the Court gives its decision with the same final and binding effect as in a case affecting any other parties.

But if it be said that the provision of the Constitution that the law of the Union "shall be the supreme law of the land, and

the Judges in every State shall be bound thereby," is incompatible with the appellate control of the federal judiciary over the State tribunals, we answer that such a conclusion does not follow. It is true, that by this provision the "Judges in every State may construe the Constitution and the laws of the Union;" but, it does not follow that, to do this, they must construe them in the *last* resort, but only that, when they have questions before them involving these laws, they must construe them in the *first* instance. The declaration that the Judges "shall be bound thereby," is consistent with either theory. If we concede the theory to be true, that the framers of the Constitution intended this law of the land to be supreme *when* and *as* construed by the federal judiciary, "the Judges in every State" would still be "bound thereby." And when it is said that this provision was not necessary, if the appellate power over the State tribunals was given by other provisions of the Constitution, it may be said, in reply, that it is quite doubtful whether there is a single provision in this part of the sixth article that is not the necessary and logical result of other provisions of the instrument. It would seem to be clear, that if this whole provision relating to the supremacy of the laws of the United States had been omitted, the same result would still have followed. There are several provisions of the Constitution that were evidently put in for greater certainty. The clause which gives Congress the power "to make all laws which shall be necessary and proper for carrying into effect" the powers expressly granted, is of this character. And this would seem to be true of some of the amended articles, as, for example, amended article ten, namely: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This provision, that where the power is not delegated nor prohibited, it is reserved, only renders that more certain, which, without it, would necessarily result from other provisions of the instrument. It would seem to be clear that the States being sovereignties already in existence, and not intending to delegate all their powers, would necessarily reserve all those *not delegated*, except those which, though not delegated, were *prohibited*. There are powers not delegated to the federal government, and yet prohibited to the States.

But if we judge this question by authority, the overwhelming weight of it will be found to sustain the position we have endeavored to maintain.

Mr. Madison, in the thirty-ninth number of the Federalist, uses this clear language:

"In this relation, then, the proposed government can not be deemed a *national* one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a resi-

duary and inviolable sovereignty over all other objects. It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local governments—or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."

In the Virginia debates Mr. Madison also said :

"It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its co-ordinate branches. There is no example in any country where it is otherwise. There is no new policy in submitting it to the judiciary of the United States." (2 Elliot's Debates, 390; 1 Story on the Con., 267, note 2.)

The same position was sustained by Alexander Hamilton.

"The Constitution," says he, "in direct terms, gives an appellate jurisdiction to the Supreme Court, in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior Federal Courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated." (Federalist, No. 82.)

The Federalist has always been regarded as very high authority, not only because mainly composed of the writings of Madison and Hamilton, who were both members of the Convention, but especially because these essays were regular and elaborate commentaries on the proposed Constitution, and were published while the Constitution was before the nation for ratification or rejection; and must have been read and well understood by all the distinguished men who participated in the discussions of that day. These papers were expressly written in answer to objections founded upon the extent of the powers conferred upon the new government, and the diminution of State sovereignty. And when we reflect that this right of the national judiciary to determine in the last resort is frankly avowed and defended in these essays, written by such distinguished members of the convention, and so widely circulated, at the time, the conclusion seems irresistible that no other construction could have been intended by those who framed, or those who ratified the Constitution.

"A contemporaneous exposition of the Constitution," says Chief Justice Marshall, (6 Whea., 420,) "certainly of not less

authority than that which has been just cited, is the Judiciary Act itself. We know that in the Congress which passed that act were many eminent members of the convention which framed the Constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts, in the cases therein specified, to be unauthorized by the Constitution."

This point was brought before the Supreme Court of the United States, in the case of *Martin v. Hunter's Lessee*, 1 Wheaton, 304, and the appellate power of the Supreme Court over the judgments of State tribunals fully sustained. It was again brought before that Court in the case of *Cohens v. The State of Virginia*, (6 Whea., 264,) and again received the most elaborate consideration, and the appellate power of the Supreme Court was again affirmed.

The opinion of Chief Justice Marshall, in the latter case, is distinguished for its clearness and force. In alluding to the three positions assumed by the counsel of the State, he remarks:

"They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the Constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or if a mischief, is irremediable."

And in reference to the nature of our system, he says:

"America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of the States, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

In another portion of the opinion, the Chief Justice says, in reference to the weight of authority in support of the appellate

power of the Supreme Court of the United States over the State tribunals:

“While on this part of the argument it may be also material to observe that the uniform decisions of this Court, on the point now under consideration, have been assented to, with a single exception, by the Courts of every State in the Union, whose judgments have been revised.”

“This concurrence of statesmen, of legislators, and of judges, in the same construction of the Constitution, may justly inspire some confidence in that construction.”

Mr. Justice Story, in his thorough and able opinion delivered by him in the case of *Martin v. Hunter's Lessee*, referring to the same weight of authority says: “It is a historical fact, that the exposition of the Constitution, extending its appellate power to State Courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State Conventions. It is a historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is a historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, the acquiescence of enlightened State Courts, and these judicial decisions of the Supreme Court, through so long a period, do, as we think, place the doctrine upon a foundation of authority which can not be shaken, without delivering over the subject to perpetual and irremediable doubts.” (1 Wheaton, 351.)

The doctrine settled by these and other decisions of the highest tribunal known to the Constitution, was never denied by any State Supreme Court except that of Virginia, until the decision of this Court in the case of *Johnson v. Gordon*. Since the decision in that case, the Supreme Court of the State of Ohio, (23 Ohio R., 26,) in a late opinion, has taken the same ground.

But it would seem that no argument could more fully show the theoretical and practical error of such a principle, than the confusion that must be the legitimate result of these decisions.

The framers of the Constitution of the United States must have had some adequate motive for extending the jurisdiction of the national judiciary to cases in which an alien is a party; and

whatever reason can be supposed to have induced that provision, it must, in the nature of the case, apply as well to an alien defendant, as to an alien plaintiff. If it be a personal privilege, it must be as important to the one as the other.

This provision was no doubt intended to secure the rights of aliens against local State interests and prejudices. It is well known that before the adoption of the present Constitution, debts due to British subjects before the revolution could not be recovered in the State Courts, although protected by the treaty recognizing our independence. (2 Story on the Con., 469, note 1.)

In reference to this jurisdiction, Alexander Hamilton remarks, in the eightieth number of the *Federalist*: "The peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of Courts is, with reason, classed among the first causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the necessity of public tranquility."

As the privilege of the alien, of suing or being sued, is a personal privilege, he may readily waive it; but when he does assert it, whether he is a plaintiff or defendant, it should be accorded to him. Had Gordon been the plaintiff in that case, we presume his right to sue in the Federal Courts would not have been questioned. It is not perceived why he had not the same privilege of being sued in the same tribunal. His being plaintiff or defendant could not change his personal privilege nor defeat the national ends contemplated by the Constitution. The result was, that as Gordon was a defendant, sued within this State, his privilege was useless. Had he been sued within another State, his privilege would have been secured to him.

We have thus endeavored to state a portion of the reasons that compel us, under our constitutional oath, and our solemn duty to the Union, as well as to this State, to dissent from the doctrine laid down in the former decisions of this Court. With the utmost deference to the opinions of the distinguished members of the Court by whom these decisions were made, we must think them erroneous in principle, and practically destructive of the ends contemplated by our great national charter. It is a painful and delicate duty, and did we rely solely upon our own deductions, we should not have the same confidence in the correctness of our decision as we now do, when we are not only sustained by the highest efforts of our own reason, but by a weight of authority that would seem to be irresistible and conclusive.

It remains but to inquire whether, under the Judiciary Act of

1789, the defendant could be sued in a State Court. That act gives the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." \* \* "Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

It will be seen that only "a common law remedy is reserved to the suitor in the State Court." Is the *remedy* sought in this case a common law remedy? We think most clearly not. (Conklin's Tra., 152, 154; 1 Kent, 417, 380.)

If we hold that the common law remedy left to suitors under the saving clause in the ninth section of the Judiciary Act, *includes* proceedings *in rem*, as well as proceedings *in personam*, then the exception mentioned in the act is fully as broad as the general rule, and entirely destroys it. The District Courts could not then have *exclusive* jurisdiction in all civil admiralty cases.

In the case of *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. R., 344, the rule laid down, as deduced from previous cases, for determining the question of jurisdiction, "was the nature and subject-matter of the contract; whether it was a maritime contract, and the service a maritime service, to be performed upon the sea, or upon waters within the ebb and flow of the tide." (P. 392.)

In that case, Mr. Justice Nelson, in delivering the opinion of the Court, speaking of the construction of that part of the ninth section of the Judiciary Act, conferring *exclusive* original cognizance of all admiralty and maritime civil causes, but reserving to suitors the common law remedy, says:

"The Common Law Courts exercise a concurrent jurisdiction whether of tort or contract (with the exception of proceedings *in rem*,) which, upon the construction contended for, would be transferred from the admiralty to the exclusive cognizance of these Courts.

The meaning of the clause we think apparent. By the Constitution, the entire admiralty power of the country is lodged in the federal judiciary, and Congress intended, by the ninth section, to invest the District Courts with the power, as Courts of original jurisdiction.

The term "exclusive original cognizance" is used for this purpose, and is intended to be exclusive of the State, as well as the other Federal Courts.

The saving clause was inserted, probably, from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed.

This leaves the concurrent power where it stood at common law.

"The exclusive jurisdiction in admiralty cases was conferred

on the national government, as closely connected with the grant of the commercial power." (Pp. 390, 392.)

It would then seem clear not only from the definite language of the ninth section of the Judiciary Act, but from the language of the Supreme Court just quoted, that *exclusive original* jurisdiction in such cases was intended to be conferred by the act upon the District Courts. It is equally clear that this section of the Judiciary Act is in conflict with the act of the Legislature of this State conferring admiralty jurisdiction upon the Courts of this State. We must, therefore, of necessity, decide between them.

We have found no decision made by the Supreme Court of the United States upon the precise point involved; that is, had Congress the constitutional power to make the *original* jurisdiction in *civil* admiralty cases *exclusive* in the District Courts? This being true, we are left to construe this clause according to our own judgment.

The rules of construction laid down by Mr. Hamilton and quoted in the opinion in the case of *Johnson v. Gordon*, are conceded to be correct. The jurisdiction in admiralty cases is not given to the federal judiciary in exclusive terms, nor prohibited to the States; and to render the grant exclusive, the exercise of the power by the State tribunals must "be absolutely and totally contradictory and repugnant."

If we deny the right of appeal from the State Courts to the Supreme Court of the United States, then the exercise of admiralty powers by the State Courts would "be absolutely and totally contradictory and repugnant" to the exercise of the same power by the federal tribunals. The very end and purpose of conferring this power upon the national government would seem to be practically defeated, where the supervisory power of the same Supreme Court is denied. The uniformity intended could never be attained. If the State Courts have concurrent jurisdiction in all civil admiralty cases, and the right of appeal does not exist, then the plaintiff could select his Court of *last* resort, while the defendant could not. There being no uniformity of decision under this theory, it would give the plaintiff an advantage which he should not possess.

It is true, that this power of choosing his Court of last resort, is unquestionably given to the plaintiff in certain cases; as, for example, where the jurisdiction of the Federal Courts depends upon the character of the parties, and not upon the nature of the questions involved. But in these cases, as the subject-matter of the suit arises under a State law, the Federal Courts are bound to follow the rule of decision laid down by the Court of last resort in the State under whose law the case arose. So that, practically, the Supreme Court of the State determines the law of the case, whether the suit be brought in the Federal or State Courts.

It is only upon the distinct ground that the appellate power of the Supreme Court of the United States extends to the State Courts in proper cases, that the concurrent *original* jurisdiction of the State and Federal tribunals over *civil* admiralty cases, can be sustained. Conceding this appellate power to exist, then there is nothing in the language of the Constitution, or in the nature of the jurisdiction itself, to make it exclusive. The exercise of this original jurisdiction by the State Courts, subject to the supervisory power of the Supreme Court of the United States, would seem to be compatible with the harmony and efficiency of the system, and beneficial in its practical effects.

Chancellor Kent, and Mr. Rawle, (1 Com., 412; Rawle on Con., 202,) considered the admiralty jurisdiction of the District Courts as exclusive in all cases; but Mr. Justice Story doubts the correctness of this view. (2 Story on the Con., § 1673, note.) He considers the jurisdiction as not depending upon the pleasure of Congress, but upon the "reasonable interpretation of the Constitution." In another section, (1754,) Mr. Justice Story says :

"It seems to be admitted, that the jurisdiction of the Courts of the United States is, or at least may be made exclusive, in all cases (*in their character exclusive*) of admiralty and maritime jurisdiction."

The suit in this case is upon a maritime contract, and we conceive the jurisdiction as not "in its character *exclusive*," and that, therefore, the District Court had jurisdiction of the subject-matter of the suit, and the demurrer should have been overruled. There are several other causes of demurrer assigned, but we think they are not well taken.

I think the judgment should be reversed, and the cause remanded for further proceedings.

TERRY, C. J.—Counsel contends that defendant can not be held responsible in this form of action, because it appears that only a part of the distance, or voyage, was to have been made on the defendant, and that defendant can not be held responsible for the failure of the entire contract.

The complaint charges a breach of the contract, by the failure of defendant to perform the voyage to the port of San Juan, in Nicaragua, and we think this is a sufficient breach of the contract to support the action; for aught that appears, the detention was wholly caused by the failure of defendant to land the plaintiff at San Juan.

The objection to the joining the wife as plaintiff is not tenable. The action, though based on a contract, sounds *in tort*. The gist of it is the personal injury to the wife, by reason of forcing her to land at Panama, and remain exposed to the unwholesome climate for a period of two weeks.

"The husband and wife *must* join if the action be brought for

the personal suffering or injury to the wife, and in such a case the declaration ought to conclude to their damage, and not to that of the husband alone, for the damages will survive to the wife, if the husband die before they are recovered." (1 Chitty on Plea., 73, and authorities cited.)

A cause of action in which the husband alone was interested, to wit: the loss and expenses occasioned by the breach of the contract, was improperly joined in the complaint, but as no exception was taken by the demurrer to the misjoinder of causes of action, the objection must be deemed waived.

The counsel for respondent seems to rely mainly on his objection to the admiralty jurisdiction of the State Court, and his argument is chiefly devoted to an examination of decisions heretofore made by this Court in favor of such jurisdiction.

Indeed, so great is his zeal for the demolition of certain doctrine promulgated by this Court, that he has gone beyond the questions raised by the record to attack its decision in *Johnson v. Gordon*, upon a question which is not involved in or necessary to the decision of the case. As that decision received the unanimous approval of the learned Judges who, at the time of its rendition, constituted the Supreme Court of California, we do not feel warranted in entering into an examination of it, unless such a course is rendered absolutely necessary to the proper adjudication of the questions directly involved in the record before us.

In *Johnson v. Gordon*, this Court decided against the validity of the twelfth and twenty-fifth sections of the Judiciary Act of 1789, which provided for the removal to the Federal Courts of causes commenced in the State Courts, and for an appeal, in certain cases, from the highest State Court to the Supreme Court of the United States. These questions are, as I conceive, no way involved in the record under consideration; and, indeed, if the counsel should succeed in establishing the correctness of his proposition, as to the appellate jurisdiction of the Supreme Court of the United States, he furnishes the strongest argument in favor of the concurrent admiralty jurisdiction of the State Courts.

Commentators lay down three rules by which the exclusiveness of a grant of jurisdiction to the Federal Courts may be determined:

1. If the grant of jurisdiction is expressly made exclusive.
2. If the exercise of it be prohibited to the States.
3. If the exercise of the power or jurisdiction by the State Courts is incompatible with the harmonious working of the system established by the Federal Constitution.

Now, the grant of admiralty jurisdiction to the Federal Courts is not, in terms, exclusive. The exercise of it is not prohibited to the State Courts; and if the counsel be correct, and a writ of error will lie from the Supreme Court of the United States to

this tribunal, the exercise of concurrent jurisdiction in such cases, by the State Courts, is not incompatible with the harmonious working of the federal judiciary system. Uniformity of decisions can as well be maintained by the supervision and control which the Supreme Court of the United States will exercise over the State Courts in such cases, by virtue of its appellate jurisdiction, as by confining the determination of causes of that nature exclusively to the Federal Courts.

The counsel contends that whatever weight or authority might have attached to the decision in *Johnson v. Gordon*, was removed by the act of the California Legislature, passed April, 1855, which provided for the removal of causes, and for appeals from the State to the Federal Courts, in certain cases.

If this act be regarded as a construction of the Constitution of the United States, by the Legislature of California, and such construction as authority binding on the Courts, the authority of the same tribunal may be cited against the claim of exclusive admiralty jurisdiction, made in favor of Federal Courts. The Civil Practice Act, section three hundred and seventeen, provides that "all steamers, vessels, and boats, shall be liable," amongst other things, "for non-performance, or mal-performance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees."

That the provisions of this act were intended to apply to all vessels, as well those engaged in voyages to and from foreign ports, as those navigating the waters of the State, is conclusively shown by reference to the language of the act of 1850. This act provided that all steamers, vessels, and boats, *navigating the waters of this State*, shall be liable, etc. The Legislature of 1851, while incorporating the provisions of this law into the Civil Practice Act, omitted, *ex industria*, the words limiting its application to vessels navigating the waters of the State. If the act of the Legislature of 1855 be authority in favor of the validity of the twelfth and twenty-fifth sections of the Judiciary Act, sufficient to overthrow the opinion of this Court in the case of *Johnson v. Gordon*; the statute of 1851, which stands unrepealed, is equally authority to sustain the decision in *Taylor v. The Columbia*, which is against the constitutionality of the ninth section of the same act. We apprehend, however, that the province of determining the validity of statutes belongs more properly to the judicial than the legislative department of our government.

This case differs from *Johnson v. Gordon* in another important respect. The questions presented in *Johnson v. Gordon* had been distinctly raised, and, after full argument, decided by the highest judicial tribunal in the republic, and these decisions having been acquiesced in, for a long series of years, the rule *stare*

*decisis* might well be invoked in favor of their finality. But with all his zeal and research, the counsel has not been able to find a single case in which the question as to the exclusiveness of the jurisdiction of the Federal Courts in admiralty cases has been *directly* decided. There are, it is true, numerous *dicta* of the Federal Judges asserting, or, more properly speaking, assuming, that their jurisdiction in such cases is exclusive, but those *dicta* occur in cases where the question was neither argued, nor its decision necessary to the complete adjudication of the points really at issue.

The first case cited is that of *Slocum v. Maberry*, (2 Wheaton, 1,) which was an action begun in the State Court of Rhode Island, to recover the cargo of a vessel which had been seized by Slocum, who was a custom-house officer, for an alleged infraction of the Embargo Act. The exclusive admiralty jurisdiction of the Federal Courts was not questioned by the defendant in error. The judgment of the State Court was defended on the ground that the Embargo Act only authorized the seizure of the *vessel*, and did not affect the cargo; and this view was sustained by the Court. The next is the case of *Gelston v. Hoyte*, (3 Wheaton, 346,) which was an action for damages for taking from the possession of plaintiff a ship, and other property. The defendant justified by averring a seizure of the ship under an order from the President of the United States, for a violation of the neutrality law.

On the trial, the plaintiff produced a record of proceedings to enforce a forfeiture of the vessel before the United States District Court, by which it appeared that the vessel had been acquitted and ordered to be restored to plaintiff.

The defendant offered proof, tending to show that the plaintiff had violated the law in fitting out the vessel for the service of a foreign State, to be used against another State at peace with the United States. The State Court rejected the evidence on the ground that the judgment of the United States Court, on the question of forfeiture, was conclusive.

The legality of this ruling was the only question raised by the bill of exceptions; it was the only one really decided by the Court, and on this point the judgment of the State Court was affirmed.

Mr. Justice Story, in his opinion delivered in the case, (to quote the language of Mr. Justice Johnson, who concurred in the *judgment*) "goes into the consideration of a variety of topics, which do not appear to be essential to the case."

In the case of the bark *Chusan*, 2 Story, 455, there was no question of jurisdiction either raised or decided. The action was brought in the Federal Court, to enforce a lien for materials furnished a vessel in the port of New York, and the question decided was, that the United States Courts were governed in

the enforcement of such contracts by the general and not by the local law.

The case of *Warring v. Clark*, 5 Howard, 461, was an action growing out of a collision on the Mississippi river, about one hundred miles above New Orleans, but within the ebb and flow of the tide; and the question there was, not whether the admiralty jurisdiction of the United States Court was exclusive, but whether it extended to that case.

Thus it will be seen that there is no adjudicated case sustaining the constitutionality of the ninth section of the Judiciary Act, and the doctrine of *stare decisis* can not be invoked in behalf of the position of respondent, and against the reasoning and opinions of this Court.

The loose expressions of the Federal Judges occurring in opinions involving other and very different issues, can not be regarded authority upon the question of jurisdiction.

There is often contained in the published decision of the Courts two different kinds of opinions, *judicial* and *extra-judicial*.

A judicial opinion is one that is on the question before the Court: it is the direct, solemn, and deliberate decision of the Court upon the issues raised by the record and presented in the argument. Such an opinion is absolutely binding on all subordinate tribunals, and is received as authority in Courts of co-ordinate jurisdiction.

An extra-judicial opinion is an opinion given on a question that it was not necessary to decide in the case in which it was given. (4 Burr., 2068.) Or on a point which was not then the point in question. (1 Strange, 37.) Or, a proposition generally expressed, and which the case, or the circumstances of the case, did not call for. (5 Taunt., 153, 159.) Or, an opinion on a point which was not the point argued before the Court, or upon which the Court pronounced its judgment. (3 B. & A., 122.) Or, an opinion not called for by the case, and which it was unnecessary to give. (2 Young & I., 379.)

The practice of introducing *obiter dicta* into the opinions of Judges has been often deprecated, "because having a tendency to uphold a doctrine, or point, which, perhaps, on examination can not be sustained, while the support which it derives from the *dicta* is sufficiently powerful to invite litigation." (1 Blackstone, 53.)

In delivering the opinion of the Court, in *Pendack v. McKinder*, Wills, J., says: "I shall confine myself to the question before us, because I have observed great mischiefs arise from Judges giving *obiter* opinions." (Wills, 666.) In *The King v. The College of Physicians*, (7 T. R., 287,) Lord Kenyon said: "I can not but lament that learned Judges, in deciding the cases reported in Burrow, did not confine themselves to the points

immediately before them, but have dropped hints that perhaps have invited litigation."

Such opinions are regarded as the mere gratuitous expressions of the Judge pronouncing the judgment, and not as the deliberate ruling or opinion of *the Court*; and though the well established reputation, for learning and ability, of the Judge in whose opinion they occur may, in some cases, entitle them to respectful consideration, they have never been regarded as authority.

In *Chase v. Westman*, Lord Ellenborough remarks of a *dictum* of Lord Holt, in *Collins v. Ougby*: "But the point was not in judgment before my Lord Holt, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned Judge." (5 Maule & Sel., 185.)

In reference to a *dictum* of Lord DeGray, in *Farmer v. Arundel*, Mr. Justice Gibbs said: "Now the case did not call for this proposition, so generally expressed, and I do think that doctrine laid down so very widely and generally, when it is not called for by the circumstances of the case, is but little to be attended to." (*Brisbane v. Dacre*, 5 Taunt., 153.)

Chief Justice Vaughn remarks of such opinions: "An extra-judicial decision, given in or out of Court, is no more than the *prolatum* or saying of him who gives it; nor can it be taken for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such or a contrary opinion had been broached, is no judicial opinion, but a mere *gratis dictum*. But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the Judge's oath, upon deliberation, which assures us it is, or was when delivered, the opinion of the deliverer." (Vaughn, 382.)

It is said that the claim to exclusive admiralty jurisdiction by the Federal Courts, has been acquiesced in by the various State Courts for a period of sixty years, and was for the first time brought in question in the case of *Taylor v. The Columbia*.

It is true that such jurisdiction has been for a very long time exclusively exercised by the Federal Courts; the selection of a forum for the trial of causes, is the act of the party instituting proceedings; the jurisdiction of the Federal Courts in a certain class of action was never questioned, while the language of the Judiciary Act threw a doubt upon the concurrent jurisdiction of the State Courts. Where both tribunals were equally accessible, parties and counsel preferred to commence actions in the Federal Courts rather than be compelled to be at the cost and labor of procuring a decision on the constitutionality of an act of Congress.

This fact, however, furnishes no evidence of acquiescence on

the part of the State Courts. Court were organized for the trial not of questions, but of cases; and questions of vital interest to the whole people may rest in doubt and uncertainty for years, unless they are presented to the Court by the record of a case before it, and their decision becomes necessary to the determination of the rights of the parties litigant.

As the power of a Court to determine questions depends upon the action of parties litigant, their acquiescence in a doctrine can be shown only by a direct recognition of its legality.

The several States of the Union are sovereign, and endowed with all the attributes and right of independent States, except such as by the Constitution have been surrendered to the United States, or prohibited to the individual States. Amongst the attributes of sovereignty, is the power and jurisdiction to determine fully all controversies affecting the rights of her citizens.

This power has not, as we have endeavored to show, been surrendered, either expressly or by necessary implication, but remains in full vigor in the State government.

Jurisdiction in certain causes was given by the Federal Constitution to the United States Courts; but this grant contains no words of exclusion, nor any evidence of an intention to take from the tribunals of the several States the powers which were vested in them.

On this point we think the argument of Judge Bronsen, in *Delafield v. The State of Illinois*, conclusive: "There is nothing in the nature of jurisdiction, as applied to Courts, which renders it exclusive. It is not a grant of property, which can not have several owners at the same time. It is matter of common experience that two or more Courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to the Judge, but an authority or power to do justice in a given case when it is brought before him. There is, I think, no instance in the whole history of the law, where the mere grant of jurisdiction to a particular Court, without any words of exclusion, has been held to oust any other Court of the powers which it before possessed. Creating a new forum, with concurrent jurisdiction, may have the effect of withdrawing from the Courts which before existed a portion of the causes which would otherwise have been brought before them; but it can not affect the power of the old Courts to administer justice, when it is demanded at their hands."

This question has heretofore been decided by this Court in *Taylor v. The Columbia*, and we entertain no doubt of the entire correctness of that decision.

Judgment reversed, and cause remanded for further proceedings.

FIELD, J.—The objections raised by the demurrer go to the parties plaintiff, and to the jurisdiction of the Court.

As to the first objection, I can not concur with my associates. The action is confessedly based upon the provision of the statute which renders steamers liable for the non-performance of any contract for the transportation of persons or property, made by their owners, masters, agents, or consignees. The contract is the substantive cause of action, and the injuries received are alleged by way of special damage. The wife was, therefore, improperly joined as a party plaintiff, and the demurrer for the misjoinder is, in my judgment, well taken.

By the second objection, the constitutionality of the act of the Legislature is drawn in question. It is contended that the act confers upon the State Courts a jurisdiction in conflict with the admiralty and maritime jurisdiction of the Federal Courts, and and that the latter is exclusive. On this point, I concur in the views of the Chief Justice; and until the question of exclusive jurisdiction in the Federal Courts is directly passed upon by the Supreme Court of the United States, and the jurisdiction to the exclusion of all cognizance by the State Courts is affirmed, I think we should hesitate to declare the act of the Legislature unconstitutional, and reverse the former deliberate judgment of this Court.

BURNETT, J., on petition for a re-hearing:

The learned counsel for the defendant, in his petition for a re-hearing, has suggested some difficulties, which it is proper to notice. It is insisted, that the whole course of reasoning of my former opinion tends to the conclusion that the original jurisdiction of the District Courts of the United States, in civil admiralty cases, is exclusive.

It may be true, and, for the sake of the argument only, we will concede the fact, that, under the Constitution of the United States, and the Judiciary Act of 1789, an appeal from this Court to the Supreme Court of the United States, will only involve the *question of jurisdiction*, and not the merits of the decision under the Admiralty Code. But this in no way impairs the reasons given, or the grounds upon which the opinion was based.

When the Constitution extended the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," it made the Maritime Code the law of the nation. As such, it is not in the power of a State to change it. If changed, it must be done by the National Legislature. The provision, that the judicial power shall extend to all such cases, is fully satisfied when the *appellate* power is extended to them. (Kent, pp. 318, 320.)

In the case of *Wiscart v. Dauchey*, (3 Dallas, 321,) it was held that only appellate jurisdiction is given to the Supreme Court in those cases where the jurisdiction depends upon the nature of

the subject-matter; and "even this appellate jurisdiction is likewise qualified; inasmuch as it is given, with such exceptions and under such regulations as Congress shall make." "Here, then," continues the Chief Justice, "is the ground, and the only ground on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we can not exercise an appellate jurisdiction; and, if the rule is provided, we can not depart from it." This view was confirmed by the subsequent cases of *Clark v. Bazadoni*, (1 Cranch, 77,) *The United States v. More*, (3 Cranch, 159,) and *Duroussian v. The United States*, (6 Cranch, 307.)

The failure of Congress to provide for an appeal from the State tribunals, in civil admiralty cases, can not affect the question as to their concurrent original jurisdiction, under the Constitution of the United States. If this concurrent original jurisdiction exists, then the right of appeal depends upon the pleasure of Congress.

As to another point, involving a question of practice, it is proper to give the reasons which induced me to concur in deciding the point against the defendant.

I concur with my Brother Field, that "the contract was the substantive cause of action, and the injuries received were alleged by way of special damage." But I do not concur with him in the conclusion he draws.

It is true, that the husband and wife were nominally joined as plaintiffs; but the cause of action, as distinctly set forth in the complaint, was a contract *only* between Warner and the owners of defendant. The name of Mrs. Warner was, therefore, mere surplusage, and not a defect of parties under the fortieth section of the Code, and might have been stricken out on motion, if desired. (1 Ch. Plead., 14, note 10; Code, § 69.) Had final judgment been rendered for plaintiffs, it would have been a good bar to a subsequent suit by Warner alone, upon the *same* cause of action. All the parties to be affected by the decision were before the Court. Where A and B sue upon a *joint* cause of action, they must *prove* the joint cause, as alleged. When one plaintiff only sues, and alleges a joint cause of action, the defendant may demur, for the reason that one of the parties interested in the subject of the suit is not before the Court, and may not be bound by the decision. There are the best reasons why a defendant may demur for a defect of parties, plaintiff or defendant. This right to demur was given, to enable the defendant to have all the parties before the Court, as provided in section seventeenth of the Code.

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## ABANDONMENT.

See MINES, MINING CLAIMS, AND MINING LAWS, 4; EJECTMENT, 3, 4.

1. The removal of an inclosure of land, for the purpose of replacing it with a better one, so far from being evidence of an intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill et al.*, 556.
2. An entry, with full notice of plaintiff's rights, during a temporary removal of his inclosure, cannot be defended on the ground that the lands were uninclosed. *Ib.*

## ACCEPTANCE.

1. A drew an order on B, in favor of C, for two hundred and six dollars and fifty cents; C presented the order to B, and he paid twenty-two dollars and fifty cents thereon, and the amount was receipted on the back of the order in the handwriting of B, and signed by C: *Held*, that this was not an acceptance. *Bassett v. Haines*, 260.
2. The receipt is evidence that B owed only that sum, and paid it, and would not imply acceptance of the whole amount. *Ib.*

## ACCOUNT STATED.

1. An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the phrase "errors excepted." *Branger & Driard v. Chevalier*, 353.
2. Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake, in some cases; but this can only be done when the gross error affects all the items of the transaction. When the clear mistake affects only a portion of the items of the stated account, it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. *Ib.*
3. And when the party, who seeks to go behind the stated account, goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand. *Ib.*

## ACKNOWLEDGMENT.

See MARRIED WOMEN, 1.

1. In the acknowledgment of a married woman to a deed, there must be a privy examination. *Kendall v. Miller*, 591.
2. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a Justice of the Supreme Court, Judge of a District Court, County Judge, or notary public. *Ib.*

## ACTION, AND PARTIES TO.

See MARRIED WOMEN, 2; POSSESSION, 1.

1. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterward defendant execute an undertaking on appeal to the husband and wife, and suit is afterward brought on the undertaking, in the name of the husband and wife: *Held*, that the defendants are concluded by the acts of appellant, and that the wife is properly joined in the suit on the undertaking. *Tissot and Wife v. Darling et al.*, 278.
2. An action brought by husband and wife against a steamer, for breach of a contract to carry the wife to New York *via* Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there and consequent illness, and other injuries, though based on a contract, sounds *in tort*, and the wife is a proper and necessary party plaintiff. *Warner and Wife v. Steamship Uncle Sam*, 697.
3. *PER FIELD, J., dissenting.*—Such an action is confessedly based upon the provision of the Statute rendering steamers liable for breaches of contracts for the transportation of passengers or property. The contract is the substantial cause of action, and the injuries received are alleged by way of special damage. The wife is, therefore, not a proper party plaintiff, and a complaint, making her a party, is demurrable. *Ib.*
4. *PER BURNETT, J.*—Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife, as plaintiff, was mere surplusage, and not a defect of parties under the Code, and might have been stricken out on notice, if insisted. *Ib.*

## ADMINISTRATOR AND ADMINISTRATOR'S SALES.

See MORTGAGE, 2, 3; PARTNERSHIP AND PARTNERS, 1, 2.

1. A judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. *Chase v. Swain et al.*, Administrator, 130.
2. A judgment by default may as well be taken against an administrator as any other party. *Ib.*
3. A sale of property, under an order of the Probate Court, is a judicial act, and therefore not within the Statute of Frauds. *Halleck, Executor, v. Guy*, 181.
4. A substitution of one bidder for another, at executor's sale, who fails to comply with the terms of sale, cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give validity to the purchase. *Ib.*
5. A purchaser at executor's sale, under an order of the Probate Court, cannot refuse to pay the purchase money on the ground that the notice of sale

stated a good title, and that the title was not good. The sale was stated in the notice as a probate sale, the bidder knew its character, the effect of the deed, and is bound to examine the title for himself. In these sales *caveat emptor* is the rule. *Ib.*

6. Where the terms of the sale were, one-half of the purchase money cash, and the remainder in ninety days, with interest from date of sale, at the rate of one per cent. per month, and the purchaser elected to pay the whole amount down: *Held*, that the purchaser is entitled to a reduction for the interest on one-half of the purchase money. *Ib.*
7. A party seeking to enforce a trust against the administrator of a trustee is compelled, from the complex nature of the cause, to ask relief in a Court of Equity. The claimant of specific property is not a creditor within the meaning of the Probate Law, and therefore he is not bound to present his claim to the administrator. *Gunter, Executor, v. Janes, 643.*

AFFIDAVIT.

See PUBLICATION OF SUMMONS, 1.

AFFIRMED.

NASLEN *v.* MINTURN, (8 Cal., 540,) 335.  
 FITZGERALD & BROWN *v.* GORHAM, (4 Cal., 289,) 271.  
 STEWART *v.* SCANNELL, (8 Cal., 80,) 271.  
 VANCE *v.* BOYNTON, (8 Cal., 554,) 271.  
 PEOPLE *v.* WALLACE, (9 Cal., 30,) 32.  
 PEOPLE *v.* LLOYD, (9 Cal., 54,) 32.  
 WOODS *v.* CITY OF SAN FRANCISCO, (4 Cal., 190,) 39.  
 HAIGHT *v.* GUY, (8 Cal., 297,) 51.

AGENT.

1. The declarations of the master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, are admissible to establish the liability of the owners, in an action against them to recover damages for the destruction of the crop. *Gerkee v. California Steam Navigation Company, 251.*

APPEAL.

See STATEMENT, 3, 4; NEW TRIAL, 9.

1. Where a party appealed from a Justice's Court to a County Court, and the justice neglected to send up with the record the notice of appeal: *Held*, that it was error to refuse to allow appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg, 17.*
2. When an appeal is taken on questions of fact alone, the appellate Court will not disturb the verdict, when there is any evidence to support it. *Escolle and Wife v. Merle, 94.*
3. An appeal will lie from a judgment or order putting a party in contempt. *Ware v. Robinson et al., 107.*
4. An appeal is made by filing and serving the notice of appeal. Both requisites must exist to complete the appeal. A failure to notify the adverse party is fatal. *Whipley v. Mills, 641.*

## ARBITRATION.

1. Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the County Court: *Held*, that it was void *in toto*, that Court having no jurisdiction over the subject matter of the award. *Williams v. Walton*, 142.
2. The Court having no jurisdiction, the arbitrators could have none; nor could they have common law powers, when appointed in the mode provided by Statute. *Ib.*

## ASSIGNMENT.

1. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 325.
2. Such assignor is a competent witness in an action by the assignee to recover the amount, as the action is not for an unliquidated demand. *Ib.*

## ATTACHMENT.

See PARTNERSHIP, 1, 2, 3.

1. It is well settled that the proceedings by attachment are statutory and special, and must be strictly pursued, and when a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the Attachment Law. *Roberts & Co. v. Landecker*, 262.
2. The provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee, and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step. *Ib.*
3. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property against the garnishee. *Ib.*
4. If a statute gives a particular remedy in conferring a new right, then the particular remedy must be pursued; but under the Attachment Law a new right is created, but no practicable remedy is prescribed. *Ib.*
5. An attachment, issued before the issuance of the summons in the suit, is void, and the subsequent issuance of the summons cannot cure it. *Low et al. v. Henry et al.*, 538.
6. The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it. *Ib.*

## BAILMENT.

1. Where the defendant, a master of a vessel, received certain goods of plaintiff, to be delivered at a certain place, which he failed to do, and in the action brought thereupon he offered to prove that the goods belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of the goods by fraud: *Held*, that he was entitled to prove such facts. *Hayden v. Davis*, 573.
2. To the general rule that a bailee will not be allowed to set up title in a third party, in an action brought by the bailor, there is an exception in cases where the bailor's possession was obtained by fraud. *Ib.*

BANKERS.

1. Where money has been placed on general deposit in a bank, and negotiable certificates of deposit have been issued to the depositor for the amount, there is nothing left in the possession of the bankers belonging to the depositor, upon which an attachment issued against his property can fasten. The bankers, by their certificates, become liable, not to refund to the depositor the specific money deposited, but to pay its amount to the holder of the certificates, whoever he may be, on their presentation. *McMillan v. Richards*, 365.
2. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiffs' use. The words "had and received to the plaintiffs' use," are put as the consideration upon which to support the *assumpsit* on the part of the defendant. *Ib.*

BILL OF EXCEPTIONS.

See MANDAMUS, 4, 5; STATEMENT.

BOUNDARY LINE.

See MINES, MINING CLAIMS, AND MINING LAWS, 13, 14.

CALAVERAS COUNTY.

1. The provisions of the Act of April twenty-seventh, one thousand eight hundred and fifty-five, requiring all persons holding certain warrants upon the treasurer of Calaveras County, to present the same for registry before a certain day, or be forever barred from enforcing the payment thereof, are unconstitutional. *Robinson v. Magee*, 81.

CONSTITUTIONAL LAW.

See SLAVES, 1, 2, 3, 4, 5, 6, 7, 8.

1. Whatever provision of a statute substantially defeats the end contemplated by the parties in making a contract, must impair its obligation. As the law enters into the contract and forms a part of it, the obligation of such a contract must depend upon the law existing at the time the contract was made. The contract being then complete and operative, the Legislature cannot, by a subsequent act, impair its obligation by requiring the performance of other conditions not required by the law of the contract itself. *Robinson et al. v. Magee*, 81.
2. The power to impose conditions after the contract is once complete and perfect, is nothing but the power to impair its obligation, and this the Constitution has prohibited. *Ib.*
3. The provisions of the Act of April twenty-seventh, one thousand eight hundred and fifty-five, requiring all persons holding certain warrants upon the treasurer of Calaveras County, to present the same for registry before a certain day, or be forever barred from enforcing the payment thereof, are therefore unconstitutional. *Ib.*
4. The Constitution vests the Legislature with power to confer such jurisdiction on Justices' Courts as are not exclusively vested in other Courts. The Act conferring criminal jurisdiction on Justices' Courts is constitutional. *People v. Fowler*, 85.
5. The provision of the Practice Act authorizing judgment, personal and final, against an absent defendant, for whom the Court has appointed an attorney,

- with privilege to the defendant to come in and deny in six months, is not in violation of the Constitution of the United States, or that of this State. *Ware v. Robinson et al.*, 107.
6. The provisions of section fifteen of article six of the Constitution, respecting the salaries of District Judges, do not exempt those officers from the necessity of an appropriation for that purpose by the Legislature. *Myers v. English*, State Treasurer, 341.
  7. The power of controlling and disposing of the revenue of the State, is vested by the Constitution in the Legislature. *Ib.*
  8. It is within the legitimate power of the Judiciary to declare the *action* of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means and no power to avoid the effects of *non-action*. *Ib.*
  9. The provision of the Constitution which prohibits the passage of any law impairing the obligation of contracts, relates solely to contracts between individuals, and not to contracts between individuals and the State. *Ib.*
  10. *Pax Terry*, C. J.—The Act of April, 1858, "for the better observance of the Sabbath," is in conflict with the first and fourth sections of article first of the Constitution of this State, and is therefore void. *Ex parte Newman*, 502.
  11. The Constitution, when it forbids discrimination or preference in religion, does not mean merely to guarantee toleration, but religious liberty in its largest sense, and a perfect equality without distinction between religious sects. The enforced observance of a day held sacred by one of these sects, is a discrimination in favor of that sect, and a violation of the religious freedom of the others. *Ib.*
  12. Considered as a municipal regulation, the Legislature has no right to forbid or enjoin the lawful pursuit of a lawful occupation on one day of the week, any more than it can forbid it altogether. *Ib.*
  13. The governmental power only extends to restraining each one in the freedom of his conduct so as to secure perfect protection to all others from every species of danger to person, health, and property; that each individual shall be required so to use his own as not to inflict injury upon his neighbor; and these seem to be all the immunities which can be justly claimed by one portion of society from another, under a government of constitutional limitation. *Ib.*
  14. The Act in question is, in intention and effect, a discrimination in favor of one religious profession over all others, and as such is in violation of the Constitution. *Ib.*
  15. *Pax Burnett*, J.—Our constitutional theory regards all religions, *as such*, as equally entitled to protection, and equally unentitled to preference. When there is no ground or necessity upon which a principle can rest but a religious one, then the Constitution steps in and says that it shall not be enforced by authority of law. *Ib.*
  16. The Sunday Law violates this provision of the Constitution, because it establishes a compulsory religious observance. It violates as much the religious freedom of the Christian as of the Jew. The principle is the same, whether the Act *compels* us to do what we wish to do or what we wish not to do. *Ib.*
  17. If the Legislature has the power to establish a day of compulsory rest, it has the right to select the particular day. *Ib.*
  18. The protection of the Constitution extends to every individual or to none. It is the individual that is intended to be protected. Every citizen has the

right to vote and worship as he pleases, without having his motives impeached in any tribunal of the State. When the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything because it violates simply a religious principle or observance, the Act is unconstitutional. *Ib.*

19. The constitutional question is a naked question of legislative power, and the inquiry as to the reasons which operated on the minds of members in voting for the measure, is wholly immaterial. *Ib.*
20. If section first of article first of the Constitution asserts a principle not susceptible of practical application, then it may admit of a question whether any principle asserted in the declaration of rights can be the subject of judicial enforcement. And if such a position be true, that the rights of property cannot be enforced by the Courts against an Act of the Legislature, a power is then conceded which renders the provisions of the other sections wholly inoperative. *Ib.*
21. The right to possess and protect property is not more clearly protected by the Constitution, than the right to acquire it. The right to acquire is the right to use the proper means to attain the end; and the use of such means cannot be prohibited by the Legislature, except the peace and safety of the State require it. *Ib.*
22. Free agents must be left free, as to themselves. If they cannot be trusted to regulate their own labor, its times, and quantity, it is difficult to trust them to make their own contracts. If the Legislature can prescribe the *days* of rest for them, it would seem that the same power can prescribe the *hours* to work, rest, and eat. *Ib.*
23. *PEN FIELD, J., dissenting.*—The Act "to provide for the better observance of the Sabbath" is not in conflict with the fourth section of article one of the Constitution, which declares that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever be allowed in this State." *Ib.*
24. The Act establishes, as a civil regulation, a day of rest from secular pursuits, and that is its only scope and purpose. It treats of business matters, not religious duties. In limiting its command to secular pursuits, it necessarily leaves religious profession and worship free. *Ib.*
25. It is not the province of the Judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power not conferred by the Constitution. *Ib.*
26. The object of the Act is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. *Ib.*
27. The title of the Act, and the description of the day, will not warrant the conclusion that the intention of the law is to enforce the Sabbath as a religious institution. The terms "Christian Sabbath, or Sunday," are used simply to designate the day selected by the Legislature. The same construction would obtain, and the same result follow, if any other terms were employed, as "the Lord's day, commonly called Sunday," "the Sabbath day," or "the first day of the week," which are found in similar Statutes of other States. *Ib.*
28. That the law operates with inconvenience to some is no argument against its constitutionality. Such inconvenience is an incident to all general laws. *Ib.*
29. The title of an Act is never held to control the legislative intent. This intent is to be sought in the purview or body of the Act; and when the

language in this part is clear and unambiguous, no other part can avail to contradict or control it. The title can be resorted to only in cases of ambiguity, and is then of slight value. *Ib.*

30. Nor is this well settled rule, as to the effect of a title, in any degree changed by the twenty-fifth section of article four of the Constitution, which requires that "every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title." This section is merely directory, and does not nullify laws passed in violation of it. *Ib.*
31. In determining the question of power in the Legislature to pass the Act, the Court cannot consider whether that power was wisely or unwisely exercised, or from pure or impure motives. *Ib.*
32. The Act is not in conflict with the first section of article one of the Constitution, which declares that "all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." *Ib.*
33. The rights enumerated in this section are to be enjoyed in a constitutional government, in subordination to the general laws of the State. This section was never intended to inhibit legislation on the rights enumerated. *Ib.*
34. The Legislature possesses the power to legislate for the good order, the peace, welfare, and happiness of society. The means by which these ends are to be effected are left to its discretion; but, because the discretion may be abused, its acts are not for that reason void. *Ib.*
35. It is to be supposed that the members of the Legislature will exercise some wisdom in its acts. If they do not, the remedy is with the people. Frequent elections by the people furnish the only protection against the abuse of acknowledged legislative power. *Ib.*
36. The right to acquire property may be regulated for the public good, though thereby the facility of acquisition is lessened. *Ib.*
37. The Judiciary does not possess the right to supervise the exercise of legislative discretion in matters of mere expediency, and the assumption of such right would be usurpation. *Ib.*
38. The Act "to provide for the better observance of the Sabbath," approved April 10, 1858, is constitutional. *Ib.*

#### CONTEMPT.

See MANDAMUS, 3, 6.

#### CONTINUANCE.

1. The granting or refusing a continuance rests in the sound discretion of the Court. *Musgrove et al. v. Perkins*, 211.
2. A mistaken advice of counsel to his client, not to prepare for trial, is no ground for a continuance. *Ib.*

#### CONTRACT.

See ACTION, AND PARTIES TO, 2, 3, 4; HUSBAND AND WIFE, 3, 11, 12;  
PAROL EVIDENCE, 1, 2; FREERIES, 2.

1. When the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions, of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews & Hiller*, 73.

2. Where a party employed receives a regular specific monthly salary for his services, the presumption of law is, that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. And to overcome this presumption, he must show an express agreement for extra pay; otherwise he cannot recover. *Cany v. Halleck, Executor*, 198.

## CONVEYANCE.

See DEED.

## CORPORATION.

See RAILROAD, 1, 2, 3.

1. Where A received an assignment of stock in a corporation, and the stock was subsequently attached under a judgment against the vendor, and afterward the stock was regularly transferred to A, who then obtained an assignment of the judgment under which the stock was attached: *Held*, that the assignment of the judgment at once merged the lien in the higher right, and that A, as regarded third parties, became the absolute owner of the stock. *Strout v. The Natoma Water and Mining Company*, 78.

## CORPORATION, MUNICIPAL.

See PLEADING, 18, 19, 20, 21, 22, 23, 24.

1. *Pee Field, J.*—A municipal corporation, outside of its governmental capacity, is, in many respects, to be regarded the same as a private corporation, and its officers and agents, through whom it acts, must be presumed to know the contracts it enters into, the purchases it makes, and the property it uses. The knowledge of such matters must rest with some of its officers, and the corporation cannot shelter itself under an assertion of ignorance. *San Francisco Gas Company v. The City of San Francisco*, 453.
2. Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay, in such cases, and the implication extends equally against corporations. *Ib.*
3. A corporate act is not essential, in all cases, to fasten a liability, and if it were necessary, the law would sometimes presume, in order to uphold fair dealing, and prevent gross injustice, the existence of such act, and estop the corporation from denying it. *Ib.*
4. Where the contract is executory, the corporation cannot be held bound, unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied *assumpsit* arises against it. *Ib.*
5. It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them, without authority, have been ratified. *Ib.*
6. A municipal corporation cannot take private property for public use without making compensation in advance, or providing a fund out of which compensation shall be made as soon as the amount to be paid can be determined. *Colton v. Rossi et al.*, 595.
7. And if failure be made in paying or providing such compensation, the party may retake possession of his property. *Ib.*

8. A town, whose act of incorporation has been decided to be unconstitutional by the Supreme Court, has no legal existence as a corporation, and a judgment against it would be a mere nullity. *Ib.*

## COSTS.

See FEES.

## COUNTY CLERK, RECORDER, AND AUDITOR.

1. In counties where the offices of county clerk and county recorder are united, the officer performs the functions of auditor as recorder, and not as clerk. *People ex rel. v. Darrach*, 324.
2. It follows that where the offices have been separated in a county where they had been previously joined, the recorder becomes auditor. *Ib.*

## COUNTY COURT.

See NEW TRIAL, 7; COURT OF SESSIONS, 1, 2, 3, 4.

1. The County Court has the sole appellate jurisdiction in all cases, civil and criminal, arising in Justices' Courts, subject to such restriction as the Legislature may impose by making the decisions of the justice final in such cases as may be determined by law. *People v. Fowler*, 85.

## COUNTY JUDGE.

See COURT OF SESSIONS, 2, 3, 4.

## COURT OF SESSIONS.

1. The Court of Sessions has no appellate jurisdiction in either civil or criminal cases. Their jurisdiction is original, not appellate. In all cases where an appeal lies from a Justice's Court, it must be taken to the County Court. *People v. Fowler*, 85.
2. The Court of Sessions is composed of the County Judge and two Associates; and the presence of all is necessary to the transaction of business. *People v. Barbour*, 230.
3. Therefore, an entry in the records of the Court, when only the County Judge and one Associate were present, that the absent Associate had resigned and the appointment by the Court of a justice of the peace in his stead, is a nullity. *Ib.*
4. Where an indictment is presented to a Court consisting of the County Judge and two justices of the peace of the county, the legal presumption is in favor of its validity. *Ib.*

## CRIMINAL LAW.

See INDICTMENT.

1. An indictment must contain a statement of the facts constituting the offense charged against the defendant. The defects of an indictment are not cured by a verdict. *People v. Wallace*, 30.
2. In an indictment for murder, a statement of the manner of the death, and the means by which it was effected, is indispensable. It is also necessary to state the time and place, as well of the infliction of the wound, as of the death of the party, in order to fix the venue, and that it may appear on the record that the deceased died within a year and a day after receiving the injury. *Ib.* See *People v. Cox*, 32.

3. It is unnecessary, in an indictment for murder, to state the degree of the offense. *People v. Lloyd*, 54.
4. Under our Statute, the essential averments of an indictment should be the same as at common law; every averment that is substantially necessary for the information of the defendant, so that he may know the particular circumstances of the charge alleged against him, and how to defend himself, is still necessary. *Ib.*
5. It must be alleged that the wound was mortal, and that the party died of the wound. *Ib.*
6. It is no error for the Court, in a criminal case, to set a day for pronouncing sentence, in the absence of the prisoner. It is only requisite that he should be present when the sentence is pronounced. *People v. Galvin*, 115.
7. The reading of the Statute law and decisions of the Supreme Court, to the jury, without exceptions taken, is no ground of error. *Ib.*
8. A party cannot be convicted of larceny for taking his own property. *People v. McKinley*, 250.
9. Where the defendant was indicted for the crime of an "assault with a deadly weapon with the intent to inflict great bodily injury," and the jury found him "guilty of an assault with a deadly weapon:" *Held*, that it was error in the Court, to sentence the prisoner to two years in the State Prison. *People v. Wilson*, 259.
10. It is not error in the Court, on a trial for murder, to postpone the consideration of a motion on the part of the defendant, for a change of venue, until an attempt is made to empanel a jury. *People v. Plummer*, 298.
11. Where a motion is thus postponed, and counsel for prisoner afterward declines, on the intimation of the Court, to renew the motion, he cannot take advantage, on appeal, of the failure of the Court to order a change of venue. *Ib.*
12. The declaration of a juror, before trial, that "the people ought to take prisoner out of jail and hang him," renders him incompetent to try the case; and where a verdict of guilty has been found by such juror, the Court should grant a new trial. *Ib.*
13. An indictment for murder which charges, at a time and place mentioned, defendant feloniously assaulted, cut and stabbed the deceased, and inflicted on him one mortal wound, of which mortal wound he, on the same day, died, is sufficient. A description of the weapon used is not material. An objection that the indictment does not state the length and depth of the wound, nor in what part of the body it was inflicted, goes to the form rather than the substance of the indictment. *People v. Steventon*, 273.
14. The facts necessary to constitute the crime of murder are, that a wound was inflicted with a felonious intent, that the wound was mortal, and that death ensued from the effects of the wound within a year and a day. *Ib.*
15. As a general rule in criminal cases, this Court will not review, on appeal, an order refusing a new trial moved for on the ground that the verdict is against the evidence, unless the record contains a statement setting forth all the material portions of the testimony. *People v. York*, 421.
16. But when the record states that it gives "in substance all that was proven on the part of the State," it is sufficient. The facts, as proved, being given, there is no necessity of setting forth the testimony. *Ib.*

## DAMAGES.

1. Where, from the nature of the contract, it is not practicable to ascertain the amount of damages sustained by a breach of contract, the measure is the price agreed to be paid. *Coffee v. Meiggs et al.*, 365.
2. The rule is, that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterward. *Douglass v. Kraft*, 562.
3. Where A agreed with his tenant, who was occupying a wooden building, that, if he would give up his lease, A would erect a brick building, to cover such portion of the lot as would be satisfactory to the tenant, and would give him possession within three weeks, and a lease of the premises for six months, with the privilege of twelve months, or, on failure so to do, would pay the tenant five hundred dollars damages: *Held*, on breach of the contract on the part of A, that the sum named was a penalty, and not liquidated damages. *Nash v. Hermosilla*, 584.

## DECLARATIONS.

1. Where A, the owner of property, represents that certain property in his possession belongs to B, and that representation coming to the ears of C, a creditor of B, who sues out an attachment against B, and seizes the property: *Held*, that A is estopped from setting up a claim to the property. *Mitchell v. Reed*, 204.
2. Where the express declaration of a third party is not confidential, but general, and this is afterward acted on by others, the party making the declaration is estopped. *Ib.*
3. The *intention* with which the declaration is made is not material, except, perhaps, when the communication is confidential. It is the fact that the declaration has been acted upon by others, that constitutes the liability to them. Nor does it make any difference whether the thing admitted was true or false. *Ib.*
4. The declarations of the master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, are admissible to establish the liability of the owners, in an action against them to recover damages for the destruction of the crop. *Gerkee v. California Steam Navigation Company*, 251.
5. Where the declarations of a party in a conversation are given in evidence, the whole conversation must be taken together, but the jury are not bound to give the same weight to all parts of it; they are at liberty to consider how much, under the circumstances, is entitled to credit. *Thrall v. Smiley et al.*, 529.

## DECREE.

See SERVICE OF PROCESS, 2.

1. A decree cannot be impeached collaterally, because entered prematurely. The remedy is by a direct proceeding in the action. *Alderson v. Bell and Wife*, 315.
2. A decree adjudging that a partnership existed between two of the parties to the action, and that another partnership existed between one of them and another party to the action, each partnership embracing all business and property, both real and personal, of the parties, and deciding that the one partnership is subject to the other, and directing an account to be taken,

there being other parties to the action representing the interest of one of the partners in each partnership, is interlocutory, and not final. *Gray v. Palmer et al.*, 616.

3. Such a decree does not ascertain the specific sum due to any of the partners, nor direct the disposition of the partnership property. It does not settle the *present* condition of the partners, but only the original terms of their partnership. *Ib.*

#### DEED.

See *SHERIFF'S SALES*, 2, 3, 4; *EXECUTION*, 3; *HUSBAND AND WIFE*, 4.

1. It is not in the power of a Court of Equity to compel a married woman to correct an insufficient acknowledgment to a deed for which she and her husband have received the consideration. Her consent must be perfectly free. She can make no contract to bind herself, except in the manner prescribed by law. The provisions of the Statute must be strictly pursued. *Barrett v. Tewksbury et al.*, 13.
2. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants. *Peabody v. Phelps*, 213.
3. All previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined. *Ib.*
4. If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. *Ib.*

#### DEMURRER.

See *PLEADING*, 1, 4, 16, 28, 29; *PRACTION*, 2; *JUDGMENT*, 12, 13.

#### DEPOSITION.

1. When the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived. *Jones et al. v. Love et al.*, 68.

#### DIAGRAM.

1. It is not error to exclude from the jury a diagram, where no drawing is necessary to illustrate the fact asserted. *Thrall v. Smiley et al.*, 529.

#### DISTRICT COURTS.

1. District Courts have no power to restrain the execution of the judgments or orders of Courts of co-ordinate jurisdiction. *Gorham et al. v. Toomey et al.*, 77.
2. All proceedings to enjoin judgments must issue from the Court having the control of such judgments. *Ib.*
3. Where suit was brought in the District Court on an undertaking on appeal to the Supreme Court, given in the sum of three hundred dollars, conditioned to pay all damages and costs, not exceeding the three hundred dollars which may be awarded by the Supreme Court, and the damages and costs so awarded were only thirty dollars and fifteen cents: *Held*, that the District Court had no jurisdiction. *Page v. Ellis*, 248.

## DISTRICT JUDGES.

1. The provisions of section fifteen of article six of the Constitution, respecting the salaries of District Judges, do not exempt those officers from the necessity of an appropriation for that purpose by the Legislature. *Myers v. English, State Treasurer*, 341.

## DIVORCE.

1. In an application by the wife for a divorce, on the ground of the willful neglect of her husband, and his failure to provide her with the necessaries of life, for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit. *Washburn v. Washburn*, 475.
2. Willful neglect, whether accompanied with desertion or otherwise, is a distinct ground of divorce. *Ib.*
3. The neglect must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her destitute but for the charity of others. If those common necessaries are provided by the earnings of either, there is no such willful neglect as is contemplated by the Statute. *Ib.*
4. The earnings of both husband and wife go into a common fund, and become common property, the control and disposition of which belong to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree. *Ib.*
5. It must appear affirmatively on the part of the applicant that the husband was the owner of property sufficient to provide the necessaries of life, and neglected to do so. *Ib.*
6. The ability mentioned in the Statute has reference to the possession by the husband of the means in property to provide such necessaries, not to his capacity of acquiring such means by labor. *Ib.*

## EJECTMENT.

1. In an action of ejectment, brought solely on the prior actual possession of the plaintiff, the defendant being a mere trespasser, the latter cannot justify his act by showing the true title to be outstanding in a third person. *Bird v. Lisbros*, 1.
2. But when the plaintiff in ejectment does not rely on prior possession, but on strict title, the defendant in possession, having a good *prima facie* right, may set up and show the true title to be in another party, for he thereby proves that the plaintiff has no title with which to overcome that which the law presumes to exist in the defendant by virtue of his actual possession. *Ib.*
3. Prior possession is evidence of title; but this evidence may be destroyed by abandonment. *Ib.*
4. Where the plaintiff relies solely on the possession of his grantor, having no other title, the defendant will be allowed to show that the grantor of the plaintiff, prior to conveying to plaintiff, had abandoned the land. *Ib.*
5. Such a showing would defeat plaintiff's action, in the same manner as if his grantor had made a prior conveyance to a third party. *Ib.*
6. In such a case, all the evidence of plaintiff's title rests upon the acts of his grantor, all of which he is bound to know, when another party is, at the time of his purchase, in actual adverse possession. *Ib.*

7. A party in possession of land is deemed in law the owner, against all persons but one having superior title thereto; possession is evidence of title, and the possessor, in conveying, is deemed to convey the title itself, sufficiently to enable his grantee to maintain ejectment against a mere trespasser. *Ib.*
8. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 268.
9. Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. *Ib.*
10. It will only lie against a party out of possession claiming title when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, such as inclosure, cultivation, and the like. *Ib.*
11. The thirteenth section of the Practice Act, which provides that any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved, has no application to the action of ejectment. It refers to cases in equity. *Ib.*
12. It is the settled doctrine of the law, repeatedly affirmed by this Court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment. *Nagle v. Macy*, 426.
13. The removal of an inclosure of land for the purpose of replacing it with a better one, so far from being evidence of intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill*, 556.
14. An entry with full notice of plaintiff's rights, during a temporary removal of his inclosure, cannot be defended on the ground that the lands were uninclosed. *Ib.*
15. In an action of ejectment, a tenant cannot deny the title of the vendee of his landlord. *McKune v. Montgomery*, 575.

#### EQUITY.

See EJECTMENT, 11; INJUNCTION, 2; PROMISSORY NOTE, 2.

1. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when a District Court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief; and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and Probate Court, and allowed, it is otherwise. *Belloc v. Rogers, Administrator, et al.*, 123.

#### ESTATES OF DECEASED PERSONS.

See ADMINISTRATOR.

1. In the Act "to regulate the settlement of the estates of deceased persons," the words *claimant* and *claim* are used as synonymous with the words *creditor* and *legal demand*. It was not the scope and purpose of this action to establish claims against the estate, to be paid out in due course of administration. *Gray v. Palmer*, 616.

#### ESTOPPEL.

See DECLARATIONS, 1, 2, 3.

## EVIDENCE.

1. It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made, by the owner, or with his assent, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. *Bayley v. Administrator of McMickle, Eaton et al.*, 430.
2. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes, which its production would expose and defeat. *Ib.*
3. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases. *Ib.*
4. The facts and circumstances of the destruction must be shown, in the first instance, to the Court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. The same principle which allows the parties to prove by their own testimony the destruction, must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence. *Ib.*
5. The naked fact of voluntary destruction, without explanation, is held such presumptive evidence of fraudulent design as to preclude all secondary evidence. *Ib.*
6. The preliminary proof is addressed to the Court, and of its sufficiency the Court is the sole judge. *Ib.*
7. The secondary evidence being admitted, it becomes the province of the jury to judge of its credit and weight. It takes the place of the primary evidence, the absence of which has been explained to the satisfaction of the Court, and is entitled to the same consideration. *Ib.*
8. The terms "has executed unto," when applied to instruments of writing, import both making and delivery. *Ib.*
9. *PER BURNETT, J.*—*Quere*: Whether affidavits are admissible to prove the destruction of notes, when the plaintiff, and his witness and co-payee can be examined in open Court. *Ib.*

## EXECUTION.

1. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 137.
2. An execution issued upon a judgment of the District Court rendered in 1850, before the judgment was signed by the District Judge, is void, and a sale under such execution passes no title to the purchaser. *Wells, Trustee, v. Stout et al.*, 479.

3. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Ib.*

## EXECUTORS.

See ADMINISTRATORS AND ADMINISTRATORS' SALES, 3, 4, 5, 6.

## FEDERAL COURTS.

See JURISDICTION, 9, 10, 11, 12.

## FEES.

1. An offer to pay the justice his costs, on appeal, so soon as the appeal papers are ready to transmit to the County Court, is not a sufficient tender, under the Statute. The fees must be tendered unconditionally. *People ex rel. v. Harris*, 571.
2. The justice is not bound first to make out the papers, and then rely on his fees being afterward paid. *Ib.*

## FERRIES.

1. Where the defendants held themselves out as public ferrymen: *Held*, that in an action against them for injuries to plaintiffs' cattle by the breaking of their wharf, error in the admission of proof of their ferry-license could not injure them, as they were responsible in any case. *Polk & Hensley v. Coffin & Swain*, 56.
2. A kept a ferry across the Sacramento River under a license which had expired. Having lost his boat, he contracted with B to furnish, rig, and run another, under the license to A, which he was to renew, until the profits should repay B's advances, with interest. A neglected to renew his license. B, after waiting four months, applied for and obtained a license in his own name, and ran a ferry under the same. A brought suit against B for an accounting and return of ferry. *Held*, that A had failed to carry out his agreement, and could not recover. *Tartar v. Finch et al.*, 276.

## FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. The action of forcible entry and detainer may be maintained in three cases: First, when the entry is forcible; second, when the entry is simply unlawful, and the detainer forcible; third, when the entry was lawful, and the holding-over forcible. But in all cases, there must be something of personal violence, either threatened or actual. *Dickinson et al. v. Maguire et al.*, 46.
2. In an unlawful entry, there must be some ingredient of fraud or willful wrong on the part of the party making the entry. *Ib.*
3. The allegations of a complaint must be construed most strongly against the pleader. A complaint that alleges he is in possession, in one place, and in another avers that he is not, shows no cause of action. *Ib.*

## FORMER SUIT PENDING.

1. A plea of a former suit pending is no bar to an action where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity. *Reynolds v. Harris*, 338.

2. This Court does not deem it necessary to decide whether, in all cases, where a judgment is based upon a complaint which does not state facts sufficient to constitute a cause of action, the judgment itself may be treated as a nullity. *Ib.*

## FRAUD.

See STATUTE OF FRAUDS ; DEED, 2, 3, 4 ; BAILMENT, 1, 2 ; PROMISSORY NOTE, 2.

## GARNISHMENT.

1. The provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee ; and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step. *Roberts & Co. v. Landecker*, 262.
2. A plaintiff who has sued out an attachment and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property against the garnishee. *Ib.*
3. If a statute gives a particular remedy in conferring a new right, then the particular remedy must be pursued ; but under the Attachment Law a new right is created, but no practicable remedy is prescribed. *Ib.*

## GUARDIAN.

See MINOR, 2, 3.

1. The guardianship by nature extends only to the custody of the person of the ward, and not to his property. To entitle the guardian to manage the property of his ward, he must be duly appointed by some competent public authority. *Kendall v. Miller*, 591.
2. A guardian cannot sell even the personal property of his ward without an order of Court. *Ib.*

## HOMESTEAD.

See HUSBAND AND WIFE, 10.

1. In an action to foreclose a mortgage against a husband, where the defendant sets up the right of homestead, the Court should order the wife of defendant to be brought in as a party, as no decision upon the question of homestead can be conclusive, either upon the husband or the wife, unless both are parties. *Marks and Wife v. Marsh*, 90.

## HUSBAND AND WIFE.

See DIVORCE, 4 ; ACTION, AND PARTIES TO.

1. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterward defendant executes an undertaking on appeal to the husband and wife, and suit is afterward brought on the undertaking, in the name of the husband and wife : *Held*, that the defendants are concluded by the acts of appellant, and that the wife is properly joined in the suit on the undertaking. *Tissot and Wife v. Darling et al.*, 278.
2. An agreement for separation between husband and wife, entered into through the intervention of a trustee, is not invalid as against public

policy, and will be upheld and enforced, if followed by immediate separation, or if separation has previously taken place. *Wells, Trustee, v. Stout et al.*, 479.

3. A conveyance of land on the part of the husband to a trustee, securing the payment of an annuity to the wife, in consideration of an indemnity by the trustee against all debts of the wife, for maintenance or other account, is valid and supported by a sufficient consideration. *Ib.*
4. A provision made by the husband for the wife is not void as against subsequent creditors, provided the husband is solvent at the time. *Ib.*
5. Subsequent reconciliation and cohabitation will avoid a deed of separation; the maintenance of the wife becoming thereupon obligatory upon the husband, the consideration of the deed fails. *Ib.*
6. Mere hearsay evidence of the wife having given birth to a child more than a year after the separation, and connecting therewith the name of a third party as its reputed father, raises no presumption of access by the husband. *Ib.*
7. Mere access is not sufficient, if proved, to establish such a reconciliation and cohabitation as will avoid a deed of separation. To effect that end, the reconciliation must be permanent, and followed by cohabitation, and restore the former relation of the parties. *Ib.*
8. The rule as to the presumption of access applies only to cases affecting children, and has no application to the parties. *Ib.*
9. In an action in which a homestead right is asserted, in which an issue of fact is made as to the marriage of the parties claiming to be husband and wife, the declarations of the alleged wife to the effect that she is not married, are admissible in evidence. *Poole and Wife v. Gerrard*, 593.
10. Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so. *Ib.*
11. But where such evidence is offered simply to prove the fact that a writing was made in reference to the matter in controversy, without stating the contents of the same, it is admissible. *Ib.*

#### INDICTMENT.

See COURT OF SESSIONS, 4; CRIMINAL LAW.

1. An indictment must contain a statement of the facts constituting the offense charged against the defendant. The defects of an indictment are not cured by a verdict. *People v. Wallace*, 30.
2. In an indictment for murder, a statement of the manner of the death, and the means by which it was effected, is indispensable. It is also necessary to state the time and place, as well of the infliction of the wound, as of the death of the party, in order to fix the venue, and that it may appear on the record that the deceased died within a year and a day after receiving the injury. *Ib.* See *People v. Cox*, 32.
3. It is unnecessary, in an indictment for murder, to state the degree of the offense. *People v. Lloyd*, 54.
4. Under our Statute, the essential averments of an indictment should be the same as at common law; every averment that is substantially necessary for the information of the defendant, so that he may know the particular circumstances of the charge alleged against him, and how to defend himself, is still necessary. *Ib.*

5. It must be alleged that the wound was mortal, and that the party died of the wound. *Ib.*
6. The allegation in an indictment for larceny that the property stolen is "of the value of two hundred and five dollars," without stating "lawful money of the United States," is sufficient. *People v. Winkler*, 234.
7. An indictment against a bailee for converting to his own use certain coin and gold dust, the property of another, must state the character of the bailment and the description of the coin. *People v. Peterson*, 313.
8. An indictment for murder which charges, at a time and place mentioned, defendant feloniously assaulted, cut and stabbed the deceased, and inflicted on him one mortal wound, of which mortal wound he on the same day died, is sufficient. A description of the weapon used is not material. An objection that the indictment does not state the length and depth of the wound, nor in what part of the body it was inflicted, goes to the form rather than the substance of the indictment. *People v. Steventon*, 273.
9. The facts necessary to constitute the crime of murder are, that a wound was inflicted with a felonious intent, that the wound was mortal, and that death ensued from the effects of the wound within a year and a day. *Ib.*
10. An indictment charging "murder in the first degree" is good, as that offense includes murder in the second degree, and manslaughter. *People v. Dolan*, 576.
11. The substantial facts necessary to constitute the crime charged, must appear in the indictment with sufficient certainty to enable the Court to pronounce a proper judgment, and the party to defend against the charge; but they need not be stated with the particularity required at common law. *Ib.*
12. It is sufficient if a man of ordinary intelligence can understand from the indictment, that, under such circumstances as showed a felonious intent, a mortal wound was inflicted by the defendant upon the deceased, of which wound he died within a year and a day from its infliction. *Ib.*
13. The absence of the word "deliberate" in such an indictment, where the crime is alleged to have been committed "with malice aforethought," is immaterial, the expressions being synonymous. *Ib.*
14. It is sufficient if the indictment charge the offense in the language of the Statute defining it. *Ib.*

## INJUNCTION.

See JURISDICTION, 1, 2.

1. Pendency of a motion for a new trial does not operate as a suspension of an injunction. *Ortman v. Dixon et al.*, 23.
2. Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases. *Gardner et al. v. Perkins*, 553.
3. One Court cannot restrain by injunction the proceedings of another Court of co-ordinate jurisdiction. *Uhlfelder v. Levy*, 607.
4. Nor is the rule altered in a case where the suit in equity brings in other parties not included in the action at law sought to be enjoined. *Ib.*
5. The only exception to the rule is, where the Court, in which the action or proceeding is pending, is unable, by reason of its jurisdiction, to afford the relief sought; where several fraudulent judgments are confessed in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court. *Ib.*

6. So, where the provisions of the Code require the action to be tried in a particular county, there would be an exception, as the positive provision of the Statute must be carried out. *Ib.*
7. It is the business of the plaintiff to show in his complaint that he comes within the exception. *Ib.*

## INSOLVENCY.

1. A party whose assets are forty per cent. above his liabilities, cannot be considered insolvent. *Hunt v. His Creditors*, 46.
2. Where there is a misdescription of a note, and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwill*, 477.
3. The requirements of the Insolvent Law must be strictly followed; a failure to comply with its provisions, will deprive the petitioner of its benefits. *Ib.*
4. If an insolvent does not know the name of the owner of notes executed by him, he must state that circumstance in his schedule. In a suit on the notes, the absence of such statement cannot be obviated by proof at the trial. *Ib.*

## INSTRUCTIONS.

See *NEW TRIAL*, 10.

1. It is not error in a Court to refuse to give to the jury an instruction which embraces a question which came properly before the Court, and not before the jury. *Branger and Driard v. Chevalier*, 353.
2. In a chancery case, it is doubtful whether the refusal to give instructions to the jury, even conceding them to be correct, can be assigned as error. *Ib.*
3. It is error for the Court to charge the jury as to a question of fact, or as to the weight of evidence. *Battersby v. Abbott*, 565.

## INTEREST.

1. In a judgment in a suit on a note bearing an agreed amount of interest, the interest is to be computed and made a part of the judgment, and the judgment should bear the agreed interest. *Mount v. Chapman*, 294.

## JUDGMENT.

See *REFEREN*, 4; *PROMISSORY NOTE*, 7; *EXECUTION*, 2; *PRACTICE*, 1, 2.

1. It is no ground for setting aside a judgment by default, that the defendant was ignorant of the law requiring him to answer in ten days. *Chase v. Swain et al., Administrators*, 130.
2. To plead a former judgment in bar, it must appear not only that it was upon the same cause of action, but between the same parties. *Ib.*
3. A judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. *Ib.*
4. A judgment by default may as well be taken against an administrator as any other party. *Ib.*
5. It is essential to the validity of a judgment that it be rendered by a Court of competent jurisdiction, at the time and place, and in the form prescribed by law. *Wicks et al. v. Ludwig et al.*, 173.

6. Where the parties stipulate to try a case before the Judge in vacation, and that the judgment shall be entered as if tried at the regular term, and judgment is so rendered, such judgment is a nullity. *Ib.*
7. No trial can be had or judgment entered, except in term time. *Ib.*
8. A party is not bound by a judgment rendered in an action of ejectment where he has not received legal notice of the action. Such judgment is not evidence against him of paramount title in the plaintiff in ejectment. Mere cognizance of the existence of the action is not legal notice. To be available, the notice must apprise the party whose rights are to be affected, of what is required of him, and the consequences which may follow if he neglects to defend the action. *Peabody v. Phelps*, 213.
9. An execution issued upon a judgment of the District Court rendered in 1850, before the judgment was signed by the District Judge, is void, and a sale under such execution passes no title to the purchaser. *Wells, Trustee, v. Strout et al.*, 479.
10. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Ib.*
11. The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it. *Law v. Henry*, 538.
12. Where the record shows that a demurrer was interposed to the complaint, and was sustained by the Court, and afterward, during the same term, a judgment was rendered in favor of the plaintiff, this Court will not presume that the order sustaining the demurrer was set aside by the Court before judgment was rendered. *Seaver v. Cay et al.*, 564.
13. In such a case the record shows that judgment was improperly rendered. *Ib.*

#### JUDGMENT DEBTOR.

See *REDEMPTION*, 4, 5, 6, 7.

#### JUDICIAL NOTICE.

1. The Court is bound to take judicial notice of the general laws in force in this State at the cession of California, which remained unrepealed until the Act of April 22, 1850. Those laws are not regarded as foreign so as to require proof of their existence. *Wells, Trustee, v. Strout et al.*, 479.

#### JUDICIAL OPINION.

1. The rule is well settled, upon the soundest principles of reason, that the language of a judicial opinion, in general, must be held as referring to the particular case decided. *People v. Winkler*, 234; *Uhlfelder v. Levy et al.*, 607.

#### JURISDICTION.

See *EQUITY*, 1; *SUPERIOR COURT*.

1. District Courts have no power to restrain the execution of the judgments or orders of Courts of co-ordinate jurisdiction. *Gorham et al. v. Toomey et al.*, 77.
2. All proceedings to enjoin judgments must issue from the Court having the control of such judgments. *Ib.*

3. Where suit was brought in the District Court on an undertaking on appeal to the Supreme Court, given in the sum of three hundred dollars, conditioned to pay all damages and costs, not exceeding the three hundred dollars which may be awarded by the Supreme Court, and the damages and costs so awarded were only thirty dollars and fifteen cents: *Held*, that the District Court had no jurisdiction. Page v. Ellis, 248.
4. One Court cannot restrain by injunction the proceedings of another Court of co-ordinate jurisdiction. *Uhlfelder v. Levy*, 607.
5. Nor is the rule altered in a case where the suit in equity brings in other parties not included in the action at law sought to be enjoined. *Ib.*
6. The only exception to the rule is, where the Court, in which the action or proceeding is pending, is unable, by reason of its jurisdiction, to afford the relief sought; where several fraudulent judgments are confessed in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court. *Ib.*
7. So, where the provisions of the Code require the action to be tried in a particular county, there would be an exception, as the positive provision of the Statute must be carried out. *Ib.*
8. It is the business of the plaintiff to show in his complaint that he comes within the exception. *Ib.*
9. The grant of jurisdiction to the Federal Courts in admiralty cases is not exclusive in terms; neither is its exercise prohibited to the States, nor is its exercise by the State Courts incompatible with the harmonious working of the system established by the Federal Constitution. *Warner and Wife v. Steamship Uncle Sam*, 697.
10. *PEN BURNETT, J.*—It is only on the distinct ground that the appellate power of the Supreme Court of the United States extends to the State Courts in proper cases, that the concurrent *original* jurisdiction of the State and Federal Courts over *civil* admiralty cases can be sustained. *Ib.*
11. *PEN FIELD, J.*—Until the question of the exclusive jurisdiction in the Federal Courts is directly passed upon by the Supreme Court of the United States, and the jurisdiction, to the exclusion of all cognizance by the State Courts, is affirmed, this Court should hesitate to declare the Act of the Legislature unconstitutional, and reverse the former deliberate judgment of this Court. *Ib.*
12. *PEN BURNETT, J.*—The failure of Congress to provide for an appeal from the State Courts in civil admiralty cases cannot affect the question as to their concurrent original jurisdiction under the Constitution of the United States. If this concurrent original jurisdiction exist, the right of appeal depends upon the pleasure of Congress. *Ib.*

## JURORS AND JURY.

See RAILROADS, 5.

1. The declaration of a juror, before trial, that "the people ought to take the prisoner out of jail and hang him," renders him incompetent to try the case, and where a verdict of guilty has been found by such juror, the Court should grant a new trial. *People v. Plummer*, 298.
2. The objection to the qualification of a juror, that his name was not on the *venue* returned by the sheriff, comes too late after verdict. The objection, if it had any validity, should have been urged at the trial. *Thrall v. Smiley et al.*, 529.
3. The object of the law is to secure honest and intelligent men for the trial, and it is of no practical consequence in what order, or at what time during the term, they are summoned. *Ib.*

4. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. *Ib.*

#### JUSTICES' COURTS AND JUSTICES OF THE PEACE.

See COUNTY COURT, 1; COURT OF SESSIONS, 1; PRACTICE, 3.

1. The Constitution vests the Legislature with power to confer such jurisdiction on Justices' Courts as are not exclusively vested in other Courts. The Act conferring criminal jurisdiction on Justices' Courts is constitutional. *People v. Fowler*, 85.
2. It is the duty of a justice of the peace, when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day. *People ex rel. v. Harris*, 571.
3. An offer to pay the justice his costs, on appeal, so soon as the appeal papers are ready to transmit to the County Court, is not a sufficient tender, under the Statute. The fees must be tendered unconditionally. *Ib.*
4. The justice is not bound first to make out the papers, and then rely on his fees being afterward paid. *Ib.*
5. Where an alternative *mandamus* was issued to a justice of the peace to compel him to send up papers on appeal to the County Court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ:" *Held*, his answer is no defense to the writ being made peremptory, as the fees may have been paid *since* the service of the writ. *Ib.*
6. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a Justice of the Supreme Court, Judge of a District Court, County Judge, or notary public. *Kendall v. Miller*, 591.

#### LACHES.

See PROMISSORY NOTE, 3.

#### LAND.

See SWAMP AND OVERFLOWED LANDS; EJECTMENT; LEASE; REDEMPTION; PARTNERSHIP AND PARTNERS, 7, 8, 9, 10, 14, 15.

1. The removal of an inclosure of land for the purpose of replacing it with a better one, so far from being evidence of an intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill et al.*, 556.
2. An entry with full notice of plaintiff's rights, during a temporary removal of his inclosure, cannot be defended on the ground that the lands were uninclosed. *Ib.*

#### LANDLORD AND TENANT.

See EJECTMENT, 15.

1. A tenant who puts up machinery for a mill, in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but as between vendor and vendee, such machinery would be considered as a part of the realty. *McGreary v. Osburn*, 119.

#### LAW AND LAWS.

See RAILROAD, 5.

1. The Court is bound to take judicial notice of the general laws in force in this State at the session of California, which remained unrepealed until the Act of April 22, 1850. Those laws are not regarded as foreign so as to require proof of their existence. *Wells, Trustee, v. Stout et al.* 479.

LEASE.

1. A covenant in a lease to the lessee, "his heirs and assigns," for a term of eight years, that if the lessor shall sell or dispose of the demised premises the lessee is to be entitled to the refusal of the same, is a covenant running with the land. *Laffan v. Naglee*, 662.
2. Every covenant in the lease relating to the *thing demised*, attaches to the land, and runs with it. *Ib.*
3. The valuable privilege of pre-emption attaches to the entire property, and is therefore assignable. *Ib.*
4. A and B entered into an agreement in which it was stipulated that A should advance \$12,000 for the purpose of putting up a brick house on property of B, held by lease, and B was to convey to A one half interest in the leased premises; the balance of the costs of the building was to be borne in equal proportion. When completed, B was to rent the same, and pay over to A one-half of the rents. Building was erected at a cost of \$48,000—\$30,000 paid by A, and \$18,000 by B,—B conveyed one-half of premises to A: *Held*, that A and B were copartners. *Ib.*
5. And where one of two holders of the leasehold, holding in partnership, purchases the fee in his own name and with his own money, it enures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. *Ib.*
6. And as the relation sustained by the tenant purchasing the fee, to his co-tenant or partner, is one of confidence, the proof that the latter had waived his right must be clear, and the burden of proof rests upon the tenant purchasing. *Ib.*

LIBEL.

1. In an action for an alleged libel, a variance between the date of the libel, as set forth in the complaint—the twenty-third of June—and the date as shown in the evidence—the twenty-fourth of June—is not material, unless the defense is misled by it. *Thrall v. Smiley et al.*, 529.
2. To constitute a justification, in an action for a libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the fact detailed can only avail in mitigation of damages. *Ib.*

LIEN.

See SHERIFF'S SALES, 6: MECHANICS' LIEN; REDEMPTION, 5, 6.

LIMITATION.

See STATUTE OF LIMITATIONS.

LOST INSTRUMENTS.

See EVIDENCE, 1, 2, 3, 4, 5, 6, 7, 8, 9.

## MANDAMUS.

1. Where an alternative *mandamus* was issued to a justice of the peace to compel him to send up papers on appeal to the County Court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ:" *Held*, his answer is no defense to the writ being made peremptory, as the fees may have been paid *since* the service of the writ. *People ex rel. v. Harris*, 571.
2. A *mandamus* will not issue to compel the Court below to enter a decree upon the report of a referee; the remedy is by appeal. *Ludlum v. Fourth District Court*, 7.
3. *Quere*: Whether a *mandamus* is the proper remedy where the Court below refuses to enter a specified judgment, as directed by this Court. *Ib.*
4. Where an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal, but he cannot have a *mandamus* to compel the issuance of attachment for contempt. *Fremont v. Merced Mining Company*, 18.
5. In an application for a *mandamus* to compel a District Judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the District Judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: *Held*, that the relator is not entitled to a jury to try the issue, under section four hundred and seventy-two of the Practice Act. *People ex rel. Galvin v. The Judge of the Tenth Judicial District*, 19.
6. Courts of such extended jurisdiction and grave responsibility must, from the very nature of the case, be trusted as to the fidelity of their records, and their decision thereon is final and conclusive. *Ib.*
7. Where, pending a motion for a new trial in the District Court, the defendants violate an injunction previously issued by said District Court, this Court will issue a *mandamus* against the Judge of such District Court, to compel him to issue his attachment for contempt. *Ortman v. Dixon*, 23.

## MARRIED WOMEN.

1. It is not in the power of a Court of Equity to compel a married woman to correct an insufficient acknowledgment to a deed, for which she and her husband have received the consideration. Her consent must be perfectly free. She can make no contract to bind herself, except in the manner prescribed by law. The provisions of the Statute must be strictly pursued. *Barrett v. Tewksbury et al.*, 13.
2. In this State, the wife can appear in, and defend an action, separately from her husband. To enable her to do so she must possess, as defendant, all the rights of *feme sole*, and be able to make as binding admissions in writing, in the action, as other parties. *Alderson v. Bell and Wife*, 315.
3. In the acknowledgment of a married woman to a deed, there must be a *privity* examination. *Kendall v. Miller*, 591.
4. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a Justice of the Supreme Court, Judge of a District Court, County Judge, or notary public. *Ib.*

## MECHANICS' LIEN.

1. A tenant who puts up machinery for a mill, in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but as between vendor and vendee, such machinery would be considered as a part of the realty. *McGreary v. Osburn et al.*, 119.
2. The evident intention of the Act in relation to mechanics' liens, was to give mechanics and artisans a lien for all work done by them, upon any description of property. The first section gives a lien upon the superstructure itself, as distinct from the land; and the fourth section gives a lien also upon the land, when the same is owned by a person who caused the superstructure to be erected. *Ib.*
3. The object of the Act was to give the mechanic a lien upon whatever interest the person who caused the superstructure had, and which could be sold under execution. *Ib.*

## MEXICAN LAWS.

1. The Court is bound to take judicial notice of the general laws in force in this State at the cession of California, which remained unrepealed until the Act of April 22, 1850. Those laws are not regarded as foreign so as to require proof of their existence. *Wells, Trustee, v. Strout et al.*, 479.

## MINES, MINING CLAIMS, AND MINING LAWS.

1. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 137.
2. The pay dirt and tailings of a miner, which are the productions of his labor, are his property. *Jones v. Jackson*, 237.
3. When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose; provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such or as a mining claim. *Ib.*
4. To suffer the tailings to flow where they list, without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary. *Ib.*
5. If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass. *Ib.*
6. Where tailings are allowed to flow upon the ground of another, he is entitled to them. *Ib.*
7. Where the regulations of a mining locality require that every claim shall be worked two days in every ten: *Held*, that the efforts of the owners of a claim to procure machinery for working the claim, are, by fair intendment, to be considered as work done on the claim. *Packer et al. v. Heaton et al.*, 568.
8. So, also, is working on adjoining land in constructing a drain to enable the owners to work the claim. *Ib.*
9. In an action by a company of miners to recover possession of a mining claim, and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the com-

mentement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. *Ib.*

10. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial. *Ib.*
11. One party may locate ground in the mineral districts for fluming purposes, and another party, at the same or a different time, may locate the same ground for mining purposes; the two locations being for different purposes, will not conflict. *O'Keiffe v. Cunningham*, 589.
12. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another; but, in that case, his mining right will be subject to the prior right of deposit. *Ib.*
13. Where two several mining companies agree upon a boundary line between the claims of the two companies, and, subsequently, other parties purchase the several interests of the two companies, with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from denying the line. *McGee et al. v. Stone*, 600.
14. The fact that such line was fixed by a mistake as to the true boundaries and corners, makes no difference, as the subsequent purchasers purchased with a view to this line. *Ib.*

#### MINOR.

1. The requirement of the Statute being positive that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Gray v. Palmer et al.*, 616.
2. The failure to deposit in the post office a copy of the complaint and summons, directed to such minor, is not cured by the appearance of the mother in her own behalf. *Ib.*
3. The Court has no right to appoint a guardian *ad litem* until the infant is properly brought into Court. *Ib.*

#### MORTGAGE.

See PARTNERSHIP AND PARTNERS, 5; TRUSTEE, 1.

1. Where A mortgaged a lot of land for five hundred dollars, and afterward conveyed the same to B, a *feme sole*, in trust for her children, and A then married B, and the two together borrowed an additional sum, and executed a joint mortgage for the whole amount, to the assignee of the first mortgage, and the note for the first debt was surrendered, though the mortgage was not canceled; and the debt was again increased, and the last mortgage canceled, and a new one for the increased amount executed by A and B: *Held*, that the holder of the last note and mortgage was entitled to a judgment thereon, and to a decree of foreclosure and sale, for the amount of the first note and mortgage. *Birrell v. Louis Schie et al.*, 104.
2. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons, and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc v. Rogers, Administrator, et al.*, 123.

3. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when a District Court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief; and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and Probate Court, and allowed, it is otherwise. *Ib.*
4. The settled doctrine of equity now is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal and the land the incident; that the mortgage constitutes simply a lien or incumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagee in any of the ordinary modes of assurance, subject only to the lien of the mortgage. *McMillan v. Richards*, 365.
5. This equitable doctrine has been adopted in this State, and asserted, directly or indirectly, in repeated instances by this Court. *Ib.*
6. The mortgage being a mere security for a debt, it must follow, that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. *Ib.*
7. The original character of mortgages has undergone a change. They have ceased to be conveyances except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They pass no estate in the lands, but are mere securities; and default in the payment of the money secured does not change their character. *Ib.*
8. Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England, and in several of the States, by which the mortgagee, after default, is called upon to repay the loan by a specified day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this State can in no case become the owner of the mortgaged premises except by purchase upon sale under judicial decree, consummated by conveyance. *Ib.*
9. A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises, for its satisfaction, the surplus, if any, going to subsequent incumbrancers or the owner of the premises, and execution following for any deficiency. *Ib.*
10. The statutory right of redemption is equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law. *Ib.*
11. The estate of a mortgagee and of a judgment debtor after sale, stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption, is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it. *Ib.*
12. The decisions as to the estate of the judgment debtor after sale, become, therefore, authorities for determining the estate of the mortgagee after sale under the decree; and from them it will be found that the estate must remain in the mortgagee until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance when executed will take effect, in the one case, from the date of the mortgage, as it does in the other, from the time the lien of the judgment attached. *Ib.*
13. It follows, that a creditor of the mortgagee obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. *Ib.*

14. Such lien and right to redeem would be lost, where a prior judgment had been obtained by a third party against the mortgageor, under which his estate subject to the mortgage had been sold, and the time for redemption had elapsed, and a conveyance had been executed. *Ib.*
15. The legal estate exists in the judgment debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser. *Ib.*
16. The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him he has the same right as successor in interest to the debtor or mortgageor. *Ib.*
17. In this State a mortgage is not treated as a conveyance, vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for the debt, and default in the payment does not change its character. *Nagle v. Macy*, 426.
18. Possession by the mortgagee cannot abridge, enlarge, or otherwise affect his interest, nor convert that which was previously a security into a seizin of the freehold. *Ib.*
19. If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of debtor and creditor, or impair the estate of the mortgageor, but leaves the parties exactly as they stood previous to such possession. *Ib.*
20. The character of a mortgage, as security, is in no way affected by the fact that judgment for the debt has been obtained. *Ib.*
21. The debt and mortgage are inseparable. The latter must follow the former. As distinct from the debt, the mortgage has no determinate value, and is not a subject of transfer. *Ib.*
22. Where the mortgageor dies after decree of foreclosure entered, and no administration is had upon his estate: *It seems*, that there is no reason why the execution of the decree should be stayed. The suit is in the nature of a proceeding *in rem*. The decree binds the specific property, and the case is within the reason of the proviso in section one hundred and forty-one of the Act concerning the estates of deceased persons. *Ib.*
23. The title of a purchaser under a sale on a decree of foreclosure, cannot be impeached in a collateral action, for irregularity in the proceedings on the sale. *Ib.*
24. *PEN BURNETT, J.*—A deed and defeasance, to constitute a mortgage, must be between the same parties. *Low v. Henry*, 538.
25. Parol evidence is not admissible to show that a deed, absolute on its face, was intended as a mortgage, except in cases of fraud, accident, or mistake in the creation of the instrument itself. *Ib.*
26. In the absence of a mutuality of obligation, it must appear, by apt and express words in the instruments, that it was the intention of the parties that the transaction should amount to a mortgage. *Ib.*
27. A mortgagee who is also a trustee, is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another *cestui que trust*. *Gunter, Executor, v. Jones, Guardian*, 648.

## NEW TRIAL.

See JURORS, 1.

1. A party failing to give notice, in time, of his intention to move for a new trial, or to file his statement in time, waives his right to move for a new trial. *Caney v. Silverthorn*, 67.

2. On motion for a new trial, the filing of a counter-statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams et al. v. Gregory et al.*, 76.
3. When it appears from the bill of exceptions signed by the judges, that the motion for a new trial was heard on statement, counter-statement, and affidavits, it cannot be objected that the statement was not settled. *Ib.*
4. Where a party appears and argues a motion for a new trial, he cannot afterward object that the statement was not agreed to by him, and that it was not settled by the Judge. *Dickinson v. Van Horn*, 207.
5. In a statement for a new trial the evidence may be simply referred to, and need not be set out in the statement itself. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. *Ib.*
6. Where the evidence is not set out in a statement on appeal, this Court will presume that the Court below had good reason for granting a new trial. *Ib.*
7. The County Court has a right to grant a new trial. *Ib.*
8. A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion. *Wing v. Owens*, 247.
9. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent upon the face of the record. *Branger & Driard v. Chevalier*, 353.
10. Where a slip from a newspaper was handed by a deputy sheriff to the jury, during the progress of the trial, containing matters relating to the trial, but not in evidence, and was perused by them, and the Court subsequently, upon discovery of the fact, instructed the jury that the slip was not in evidence, and that it should be wholly disregarded by them, and it appeared that the perusal could not, from the character of the matter contained in the slip, have prejudiced the losing party: *Held*, not to be a ground for a new trial. *Thrall v. Smiley et al.*, 529.
11. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial. *Packer v. Heaton*, 568.

## NOTICE.

See REFERENCE, 1, 2, 3, 4; JUDGMENT, 8; PROMISSORY NOTE, 8; SHERIFF'S SALES, 1.

## OFFICIAL BONDS.

See SHERIFFS, 3, 4, 5, 6, 7, 8, 9.

1. The sureties upon the official bond of an officer are only responsible for the official acts, and not for private debts. *Hill v. Kemble et al.*, 71.

## ORDER FOR THE PAYMENT OF MONEY.

1. L. advanced to H. \$476, and received from H., for collection, an order for the amount upon a party indebted to him. The order not being collected, L. returned it to H. and took H.'s note for the amount advanced. In a suit on the note, H. set up as a defense, laches on the part of L., in not presenting the order, by means of which the debt was lost: *Held*, that if there were any laches, they were waived by the execution of the note. *Leonard v. Hastings*, 236.

2. A drew an order on B, in favor of C, for two hundred and six dollars and fifty cents; C presented the order to B, and he paid twenty-two dollars and fifty cents thereon, and the amount was receipted on the back of the order in the handwriting of B, and signed by C: *Held*, that this was not an acceptance. *Bassett v. Hines*, 260. \*
3. The receipt is evidence that B owed only that sum and paid it, and would not imply acceptance of the whole amount. *Ib.*

#### PAROL EVIDENCE.

See MORTGAGES, 25, 26.

1. Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so. *Poole and Wife v. Gerrard*, 593.
2. But where such evidence is offered simply to prove the fact that a writing was made in reference to the matter in controversy, without stating the contents of the same, it is admissible. *Ib.*

#### PARTNERSHIP AND PARTNERS.

See PROMISSORY NOTE, 6.

1. The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the Court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. *Adams v. Woods & Haskell, T. A. Lynch et al., Intervenor*, 24.
2. It is only in cases of insolvency that the equitable rule for a *pro rata* distribution will apply, and then as of necessity. If the firm be solvent, a creditor whose claim is due cannot be placed on a par with others whose claims are not yet due, or who have been less diligent in securing claims already due. *Ib.*
3. Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to attachment at any time before a final decree of dissolution and distribution. *Ib.*
4. The debts of a partnership must be discharged from the joint property, before any portion of it can be applied to the individual debts of the partners. *Chase v. Steel et al.*, 64.
5. The fact that a partner's interest is mortgaged for his individual debt, for the purchase money of his share in the partnership, is immaterial. He can only mortgage that which he has, viz.: a share, subject to partnership debts. *Ib.*
6. A surviving partner being entitled to the possession and control of the partnership effects, can proceed directly in the District Court to obtain the control, and to have a partition of the real estate belonging to the partnership, but standing in the name of his deceased partner. *Gray v. Palmer et al.*, 616.
7. A partnership may exist in the purchase and sale of lands, but such a partnership can only exist where the contract is reduced to writing. It is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the partners are afterward mingled; but they must be jointly concerned in the future sale. *Ib.*
8. It does not matter in whose name the real estate is held; he is only a trustee for the partnership; and for the purpose of disposal and distribution, it is to be treated as personal estate. *Ib.*

9. This being the true character of partnership real estate, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance due him. *Ib.*
10. There may be a dormant partnership in the purchase and sale of real estate as between the partners themselves, but as between the partners and third persons, the law in regard to dormant partners will not apply. *Ib.*
11. Parties may form a universal partnership, but the same would not be held to exist, unless the intention was clearly expressed. The evidence to establish such a partnership, after the death of one of the alleged partners, should be clear and full, and not subject to doubt. *Ib.*
12. It was necessary to file this bill, and make the administrator, the widow, and the infant, parties, to rebut the presumption of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of the deceased, and the administrator had possession of the personal property. These objects could only be accomplished by proceedings in the District Court, as the Probate Court did not possess the judicial means of giving relief. *Ib.*
13. A and B entered into an agreement in which it was stipulated that A should advance \$12,000 for the purpose of putting up a brick house on property of B, held by lease, and B was to convey to A one half interest in the leased premises; the balance of the costs of the building was to be borne in equal proportion. When completed, B was to rent the same and pay over to A one-half of the rents. Building was erected at a cost of \$48,000—\$30,000 paid by A and \$18,000 by B,—B conveyed one-half of premises to A: *Held*, that A and B were copartners. *Laffan v. Naglee, 662.*
14. And where one of two holders of the leasehold, holding in partnership, purchases the fee in his own name and with his own money, it enures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. *Ib.*
15. And as the relation sustained by the tenant purchasing the fee, to his cotenant or partner, is one of confidence, the proof that the latter had waived his right must be clear, and the burden of proof rests upon the tenant purchasing. *Ib.*

PATENT.

See SWAMP AND OVERFLOWED LANDS.

PLACER COUNTY.

1. The special Act of the Legislature, approved April 4, 1857, fixing the compensation of the county clerk of the county of Placer at \$3,000, was intended in lieu of all fees for services rendered the county. *Mitchell v. Stoner, 203.*

PLEADING.

See PRACTICE, 4, 5, 6; HUSBAND AND WIFE, 1; MARRIED WOMEN, 2.

1. There are but two forms in which a defendant can controvert the allegations of a verified complaint; first, positively, when the facts are within his personal knowledge, and second, upon information and belief, when they are not. *Curtis v. Richards & Vantine, 33.*
2. In no case can the allegation of a verified complaint be controverted by a denial of sufficient knowledge or information upon the subject, to form a belief. *Ib.*
3. The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issue. *Ib.*

4. An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. *Ib.*
5. Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia Ditch to them, plaintiffs, as alleged," etc. *Humphreys et al. v. McCall et al.*, 59.
6. Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, is presumptively based on information, he is not bound to deny positively, but only "according to his information and belief;" but in such case he must answer according to *both* his information and belief. The word "*belief*," as used in the Statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information. *Ib.*
7. Defendant can know what is *his* belief, and can therefore state it. This belief may be founded on the statement of others, not competent witnesses, and not under oath, etc. Yet if the defendant has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony. *Ib.*
8. In an action for damages, for diversion of water of plaintiffs, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in a third party. Such a defense should have been specially pleaded, and the third party made a party to the action. *Ib.*
9. The general rule as to the effect of a verdict upon defects in pleading, is, that wherever facts are not expressly stated which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the Court, then the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts, in fair and reasonable intendment. *Garner v. Marshall et al.*, 268.
10. No averment of notice to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of the one party as of the other. *People v. Edwards et al.*, 286.
11. An averment in the complaint, in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The non-payment of the judgment can be shown without issuing an execution. *Tissot and Wife v. Darling*, 278.
12. In all cases not within the exception of the Statute, an answer without a verification to a complaint duly verified, may be stricken out on motion; and application for judgment, as upon a default, may be made at the same time. *Drum v. Whiting*, 422.
13. Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Ib.*
14. In an action for relief on the ground of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. *Sublett v. Tinney et al.*, 423.

15. If the plaintiff wishes in such a case to bring himself within the exception of the Statute, he must allege the fact of a discovery of the fraud at a period bringing him within the exception. *Ib.*
16. When it appears upon the face of a bill in equity that the suit is barred by lapse of time, the defendant may demur. *Ib.*
17. An answer is fatally defective if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief; the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice, and cannot have any legal effect. *San Francisco Gas Company v. The City*, 453.
18. The answer that the defendant, a municipal corporation, has "no knowledge or information" in respect to the allegations of a count in a verified complaint, "and therefore denies the same," is insufficient. *Ib.*
19. The Statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in a verified complaint, to enable them to answer in the proper form. *Ib.*
20. The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The Statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *Ib.*
21. *PER BURNETT, J.*—A specific denial to each allegation of a complaint is a separate denial, applicable only to the particular allegation controverted. *Ib.*
22. When the facts alleged in a verified complaint are presumptively within the knowledge of the defendant, the Code requires his denial to be *specific*, not general. The object of the provision is to call the attention of the defendant, and to confine each denial to one allegation at a time, and not permit him to deny all at once. *Ib.*
23. The object of the Code was to narrow the proofs upon the trial; and, to accomplish this end, the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation. *Ib.*
24. There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant, but this Court can make no distinction, because the Code makes none. It is a matter for the Legislature, and not for the Court. *Ib.*
25. Where a complaint in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note: *Held*, that the averment of partnership was immaterial, and that plaintiff was entitled to judgment on the pleadings. *Whitewall v. Thomas et al.*, 499.
26. The execution of the notes, not the copartnership of the defendants at the time, constituted the material averment. *Ib.*
27. The test of the materiality of an averment in a pleading is this: could the averment be stricken from the pleading without leaving it insufficient? *Ib.*
28. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson et al. v. Blattan et al.*, 500.

29. A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Ib.*

## POSSESSION.

See PROMISSORY NOTE, 4.

1. A party in the actual possession of cattle at the time of injury, can maintain an action for an injury to them while in his possession. *Polk & Hensley v. Coffin & Swain*, 56.
2. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 268.
3. Ejectment is a possessory action, and must be brought against the occupant. It determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. *Ib.*
4. It will only lie against a party out of possession claiming title when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, such as inclosure, cultivation, and the like. *Ib.*
5. The thirteenth section of the Practice Act, which provides that any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved, has no application to the action of ejectment. It refers to cases in equity. *Ib.*
6. It is the settled doctrine of the law, repeatedly affirmed by this Court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment. *Nagle v. Macy*, 426.

## PRACTICE.

See VERDICT, 1; MANDAMUS, 2, 3, 4; WITNESS, 4; LIBEL, 1.

1. After reversal of an erroneous judgment, the parties in the Court below have the same rights which they originally had. *Phelan v. Supervisors of San Francisco*, 15.
2. Therefore, when a final judgment on demurrer to the complaint sustaining the demurrer, was reversed, the plaintiff had the right to amend, on application to the Court below. *Ib.*
3. Where a party appealed from a Justice's Court to a County Court, and the justice neglected to send up with the record the notice of appeal: *Held*, that it was error to refuse to allow appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg*, 17.
4. The Court may allow, after the close of plaintiffs' evidence, the complaint to be amended by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. *Polk & Hensley v. Coffin & Swain*, 56.
5. Under a plea of the general issue, evidence of a counter claim is not admissible, but should be especially pleaded. *Hicks v. Green*, 74.
6. In an action for damages, for diversion of water of plaintiffs, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in a third party. Such a defense should have been specially pleaded, and the third party made a party to the action. *Humphries et al. v. McCall*, 59.

7. If a party be improperly joined as defendant, the Court or jury, upon application, should first pass upon his case, and after he is discharged, he could then be examined as a witness for the other defendant. *Domingo v. Getman*, 97.
8. A plaintiff must be confined to the allegations in his complaint. *Branger and Driard v. Chevalier*, 353.
9. An objection to the form of a verdict should be made on motion for a new trial. It is too late to raise it in this Court for the first time. *Douglass v. Kraft*, 562.

PROBATE COURT.

See ADMINISTRATOR AND ADMINISTRATOR'S SALES, 3, 4, 5, 6.

PROMISSORY NOTE.

See INSOLVENCY, 2, 3, 4; PLEADING, 25, 26.

1. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills et al.*, 21.
2. When a party has given a promissory note, and the payee assigns the note, without recourse, after maturity, and suit is brought upon the note by the assignee, the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note; and praying for an injunction, and that the note be canceled: *Held*, that the case was a proper one for equitable relief, and the maker had the right to have the note canceled, so as to prevent future litigation. *Domingo v. Getman et al.*, 97.
3. L. advanced to H. \$476, and received from H., for collection, an order for the amount upon a party indebted to him. The order not being collected, L. returned it to H. and took H.'s note for the amount advanced. In a suit on the note H. set up as a defence, laches on the part of L., in not presenting the order, by means of which the debt was lost: *Held*, that if there were any laches, they were waived by the execution of the note. *Leonard v. Hastings*, 236.
4. The possession of a promissory note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved, unless a defense is interposed which would otherwise preclude a recovery. *McCann v. Lewis*, 246.
5. An agreement for the extension of the time of payment, if without consideration, is void. *Ib.*
6. A executed a note and mortgage to B. Subsequently, A and B entered into partnership in the livery business. A was to furnish the stable, hay, and grain, and board B, and B was to attend the stable, the profits to be equally divided, and the share of A was to be applied in discharge of the note. B received the sum of \$396, A's share of the profits of the business, and then, after maturity, assigned the note and mortgage to C. C brought suit against A for the whole amount. A pleaded payment and set-off. *Held*, that A was entitled to the credit of the payment. *Mount v. Chapman*, 294.
7. In a judgment in a suit on a note bearing an agreed amount of interest, the interest is to be computed and made a part of the judgment, and the judgment should bear the agreed interest. *Ib.*

8. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and non-payment, though in fact he signed as surety, and such fact was known to the payee. *Hartman v. Burlingame et al.*, 557.
9. The failure of the holder of a note to sue when requested by a surety, does not operate to discharge the liability of the latter. *Ib.*
10. If the surety desires to protect himself, he must pay the debt and proceed against the principal, or apply to a Court of Equity to compel the holder to proceed against the principal. *Ib.*

#### PROTEST.

1. The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal. It is notice, only, to the party receiving the payment, that, if the demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion. *McMillan v. Richards*, 365.

#### PUBLICATION OF SUMMONS.

1. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons, or notice, in said paper, is sufficient, and it is unnecessary for the affidavit to describe him as *principal clerk*. *Gray v. Palmer et al.*, 616.
2. The requirement of the Statute being positive that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Ib.*
3. The failure to deposit in the post office a copy of the complaint and summons, directed to such minor, is not cured by the appearance of the mother in her own behalf. *Ib.*
4. The Court has no right to appoint a guardian *ad litem* until the infant is properly brought into Court. *Ib.*

#### RAILROAD.

1. A railroad company cannot refuse to enter the transfer of stock in said company, on their books, on the ground that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock at the date of its transfer. *People ex rel. Bosqui v. Crockett et al.*, 112.
2. A by-law, passed two days after such transfer, to the effect that no transfer of stock should be made upon the books of the company, until all indebtedness of the assignor was paid, would not give the company such lien, or a right to refuse to enter the transfer on their books. *Ib.*
3. The company had a right to pass such by-law, to operate prospectively. *Quære*: Would such by-law affect subsequent purchasers without notice? *Ib.*
4. Steamboat and railroad companies, in propelling boats on the river, and cars on the railroad, must provide all reasonable precaution to protect the

property of others, and they must also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to the circumstances of the danger. *Gerkee v. California Steam Navigation Company*, 251.

5. What facts and circumstances constitute evidence of carelessness, is a question of law for the Court to determine. But what particular weight the jury should give to these facts and circumstances, is a matter for the jury. *Ib.*

#### REDEMPTION.

1. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the *creditor* does not divest the lien. He may be both a creditor and a purchaser, and still have a *prior* lien to that of the redemptioner. This can only be on the principle that the legal estate is still in the judgment debtor, until the delivery of the sheriff's deed. *Knight v. Fair*, 117.
2. The statutory right of redemption is equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law. *McMillan v. Richards*, 365.
3. The estate of a mortgageor and of a judgment debtor, after sale, stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption, is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it. *Ib.*
4. The decisions as to the estate of the judgment debtor after sale, become, therefore, authorities for determining the estate of the mortgageor after sale under the decree; and from them it will be found that the estate must remain in the mortgageor until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance, when executed, will take effect in the one case from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. *Ib.*
5. It follows, that a creditor of the mortgageor, obtaining judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. *Ib.*
6. Such lien and right to redeem would be lost, where a prior judgment had been obtained by a third party against the mortgageor, under which his estate subject to the mortgage had been sold, and the time for redemption had elapsed, and a conveyance had been executed. *Ib.*
7. The legal estate exists in the judgment debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser. *Ib.*
8. The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him, he has the same right as successor in interest to the debtor or mortgageor. *Ib.*
9. A redemption of property sold under a decree of foreclosure is accomplished by payment, under protest, of the amount claimed to be due by the sheriff, though certain portions claimed are disputed. *Ib.*
10. The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it

is made, so far as such demand is legal. It is notice, only, to the party receiving the payment, that, if the demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion. *Ib.*

11. Nor will the subsequent institution of suits, by attachment and injunction, to obtain and secure the repayment of the amount alleged to have been overpaid in the redemption, destroy the operative effect of the payment as a redemption. *Ib.*
12. Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the Practice Act, can be commenced in the county where the relator resides; the provision of the Statute that actions against a public officer for *acts done* by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. *Ib.*
13. The proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights, or in any respect affect the interest of third parties. *Ib.*

#### REFEREE.

See MANDAMUS, 2, 3.

1. The time within which a notice of a motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend on the character of the reference; whether it be special, to report the facts, or general, to report upon the whole issue. *Peabody v. Phelps*, 213.
2. In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the Court, and judgment may be entered thereon, exceptions taken and reviewed, as if the action had been tried by the Court. *Ib.*
3. Upon facts found, whether by report of the referee or special verdict of a jury, the direct action of the Court must be invoked before judgment can be entered. Hence, the time within which the notice of motion to set aside the report or verdict must be given, should date from the filing of the report, or the rendition of the verdict. *Ib.*
4. But where an action is tried by the Court without a jury, or the whole case is referred to a referee, judgment follows immediately as a conclusion of law upon the facts found, and the time within which the notice of the motion should be made, dates from the entry of the judgment. *Ib.*
5. An order of reference cannot go beyond the pleadings of the parties. *Branger and Driard v. Chevalier*, 353.
6. When the referee excludes proper or admits improper evidence, or does any other act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Ib.*
7. But when the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report, and for a new trial. *Ib.*

REGISTRATION.

See SCHOOL-LAND WARRANTS.

REPLEVIN.

See DAMAGES, 2.

SALARY.

See CONSTITUTIONAL LAW, 6, 7.

1. Where a party employed receives a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. And to overcome this presumption, he must show an express agreement for extra pay, otherwise he cannot recover. *Caney v. Halleck et al., Executors*, 198.

SAN FRANCISCO.

See MINOR ET AL. v. THE CITY OF SAN FRANCISCO, 39.

SCHOOL-LAND WARRANTS.

1. The object of the law, requiring the record of entry on lands under school-land warrants, was to give notice to subsequent locators and settlers, and a failure to record it in the proper office, will not make the location and entry void, as to a subsequent locator with actual notice. *Watson v. Robey*, 52.
2. This provision is like that of the Act concerning conveyances, which requires the record of certain instruments. A party cannot forfeit his rights by a mistake which injures no one. A party cannot complain that he was injured, by a failure to record in the proper office, when he knew the fact, without the record. *Ib.*

SERVICE OF PROCESS.

See CONSTITUTIONAL LAW, 5.

1. Courts will take judicial notice of the signatures of their officers, as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signature of the parties. In the absence of such evidence, the Court cannot notice them. *Alderson v. Bell and Wife*, 315.
2. The recital in a decree that "defendants had been regularly served with process, or had waived service by their acknowledgment," is sufficient evidence that the requisite proof was produced. In the absence of all evidence on this point, the presumption would be in favor of the jurisdiction of the Court, and of the regularity of its proceedings; and, for the want of such evidence, the decree cannot be impeached in a collateral action. *Ib.*
3. The Statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken. *Ib.*

SHERIFFS.

1. A sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Anthony v. Wessel*, 103.

2. Consequently, where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover. *Ib*.
3. The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the Statute, the obligations belonging to the other. *People v. Edwards et al.*, 286.
4. The eighth section of the Act concerning official bonds, which provides that every such bond shall be obligatory upon the principal and sureties therein, for the faithful discharge of all duties which may be required of the officer by any law enacted subsequently, applies only to the duties properly appertaining to his office as such, and not to new duties belonging to a distinct office, with the execution of which he may be charged. *Ib*.
5. The duties of sheriff, as such, are more or less connected with the administration of justice; they have no relation to the collection of the revenue. *Ib*.
6. The Revenue Act of 1854 made the sheriff *ex officio* tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miners' licenses: *Held*, that the bond in suit, entered into in 1856, must be deemed to have been executed in view of the provisions of the Revenue Act, and that all delinquencies in the collection of taxes, except foreign miners' licenses, are covered by the bond. *Ib*.
7. The defects in official bonds, which are cured upon their suggestion in the complaint, in an action upon such bonds, under the eleventh section of the "Act concerning the official bonds of officers," are omissions which, but for the Statute, would operate to discharge the obligors. *Ib*.
8. Where the obligors, in a sheriff's bond, bind themselves jointly and severally, in specific sums designated, they may all be joined in the same action, but separate judgments are required. *Ib*.
9. The defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval, is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law. *Ib*.
10. It is not necessary, in an action against a sheriff, to recover damages, (in addition to the \$200 imposed by law as a penalty,) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Parker v. Freer, Sheriff*, 642.

#### SHERIFF'S SALES.

1. In an action against a purchaser at sheriff's sale, for not paying the amount of his bid, it cannot be set up in defense, that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff. *Harvey v. Fisk*, 93.
2. The title to real estate, sold at sheriff's sale, does not pass until the execution and delivery of the sheriff's deed. *Anthony v. Wessel*, 103.
3. A sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Ib*.

4. Consequently, where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover. *Ib*.
5. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the *creditor*, does not divest the lien. He may be both a creditor and a purchaser, and still have a *prior* lien to that of the redemptioner. This can only be on the principle that the legal estate is still in the judgment debtor, until the delivery of the sheriff's deed. *Knight v. Fair*, 117.
6. In all cases where a mere lien exists, the legal estate must be in some other party than the mortgagee. This legal estate, and the consequent right to discharge the lien and save the estate, is of value, and can be sold. *Ib*.
7. An execution issued upon a judgment of the District Court rendered in 1850, before the judgment was signed by the District Judge, is void, and a sale under such execution passes no title to the purchaser. *Wells, Trustee, v. Stout et al.*, 479.
8. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Ib*.

## SIGNATURE.

See SERVICE OF PROCESS, 1.

## SLAVES.

1. The right of transit through each State, with every species of property known to the Constitution of the United States, and recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. In the matter of *Archy*, 147.
2. The character of immigrant or traveler, bringing with him a slave into this State, must last so long as it is necessary, by the ordinary modes of travel, to accomplish a transit through the State. Nothing but accident or imperative necessity, could excuse a greater delay. Something more than mere ease or convenience must intervene to save a forfeiture of property which he cannot hold as a citizen of the State through which he is passing. *Ib*.
3. But visitors for health or pleasure, stand in a different position than travelers on business, and are protected by the law of comity. *Ib*.
4. It is the right of the Judiciary, in absence of legislation, to determine how far the policy and position of this State will justify the giving a temporary effect, within the limits of this State, to the laws and institutions of a sister State. To allow mere visitors to this State for pleasure or health, to bring with them, as personal attendants, their own domestics, is not any violation of the end contemplated by the Constitution of this State. *Ib*.
5. The visible acts of a party must be taken as the only test of his intentions, in deciding whether he is entitled to be considered a mere visitor; of which fact his declarations constitute no evidence. *Ib*.
6. The privileges extended to visitors cannot be extended to those who come for both business and pleasure. A mere visitor is one who comes only for pleasure or health, and who engages in no business while here, and remains only for a reasonable time. If the party engage in any business, or employ his slave in any business, except as a personal attendant upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom. *Ib*.

7. This rule admits of no exception upon the ground of necessity or misfortune, or it would introduce uncertainty and complexity, and lead the Courts into profitless investigations. The pecuniary condition of the party is difficult of proof, and will not be inquired into; nor will the rule be relaxed to meet the hardships of a particular case. *Ib.*
8. Where the facts show that the delay of the visitor was unavoidable, the fact of his engaging in labor, in order to support himself during his necessary detention, does not divest his rights under the law of comity. *Ib.*

## STATEMENT.

See CRIMINAL LAW, 15, 16.

1. When it appears from the bill of exceptions signed by the Judge that the motion for a new trial was heard on statement, counter-statement, and affidavits, it cannot be objected that the statement was not settled. *Williams et al. v. Gregory et al.*, 76.
2. Where a party appears and argues a motion for a new trial, he cannot afterward object that the statement was not agreed to by him, and that it was not settled by the Judge. *Dickinson v. Van Horn*, 207.
3. In a statement for a new trial the evidence may be simply referred to, and need not be set out in the statement itself. *Ib.*
4. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. *Ib.*
5. Where the evidence is not set out in a statement on appeal, this Court will presume that the Court below had good reason for granting a new trial. *Ib.*
6. A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion. *Wing v. Owens*, 247.
7. Where amendments are made to a statement on appeal, a fair copy of the statement so amended should be made. Otherwise, the Supreme Court will not look into it. *Marlow v. Marsh*, 259.
8. Where there are amendments to a proposed statement on appeal, the draft proposed and the amendments allowed should be incorporated into one document, as in their separate form they cannot be regarded as any part of the record. *People v. Edwards et al.*, 286.
9. A Judge can revoke his certificate to a settled statement on appeal, during the term at which the judgment was rendered; but after the term has expired it cannot be done. *Branger and Driard v. Chevalier*, 351.
10. While the term lasts the Court has power to amend the record. After the term has passed, the record cannot be amended unless there is something in the record to amend by. The settled statement, until certified, is not record. *Ib.*
11. Where the Judge of the Superior Court certified to an engrossed statement, and subsequently revoked his certificate and ordered the statement to be made conformable to the latter settlement, which order was not entered on record; and the Judge of the Fourth District Court, to which the cause was transferred, ordered that the order of revocation and amendment be entered *sine pro tunc*, there being no record evidence on which to base such an order: *Held*, to be error. *Ib.*
12. Where the statement embodied in the record was filed on the motion for a new trial, the Supreme Court will only examine the action of the Court below in denying the motion. *Meerholes v. Sessions*, 277.

13. Instruments are sometimes admissible for one purpose and inadmissible for another; and, when objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken; otherwise they cannot be regarded. *Provost v. Piper et al.*, 552.
14. A statement on appeal is sufficient when the Judge certifies that it is substantially correct. It is not necessary that the testimony should be stated in the precise words of each witness. *Battersby v. Abbott*, 565.
15. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Ib.*

### STATUTE OF FRAUDS.

See *VENDOR AND VENDEE*, 1.

1. Where a defendant entered into a contract with a builder for the construction of a brick house, and the builder applied to the plaintiffs, who were proprietors of a brickyard, for the sale of the necessary brick, and the defendant said to the proprietors, to induce the sale, that he would become responsible for all the brick furnished his building, and whatever contract or agreement was made with the builder he would see carried out, or would pay for the brick if the builder did not: *Held*, that the promise of the defendant was within the Statute of Frauds. *Clay et al. v. Walton*, 328.
2. Such a promise is conditional, and dependent upon the default of another. If there is any doubt as to its import, the Court will look to all the circumstances of the case to ascertain the intention of the parties. *Ib.*
3. Wherever the leading object of the promiser is not to become surety or guarantor of another, but to subserve some interest of his own, his promise is not within the Statute, although the effect of the promise may be to pay the debt, or discharge the obligation of another. *Ib.*
4. But the mere fact that the debt guaranteed was for brick to be used in the building of the guarantor, does not show such an object in the promise of the guarantor. *Ib.*
5. The interest which a promiser has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise; and the interest in the principal contract, and the benefit to be derived from it, become matters of consideration only as they may serve to determine that character. *Ib.*
6. The change of possession of the property sold, must be continued. The Statute does not fix any limits when this change may cease, and if Courts could put limits to it, they could do away with the clear language of the law. *Bacon v. Scannell*, 271.

### STATUTE OF LIMITATIONS.

See *PLEADING*, 14, 15, 16.

1. A part payment made *before* a contract has expired by limitation, is insufficient to take the case out of the Statute. *Fairbanks et al. v. Dawson et al.*, 89.
2. The object of the Statute was to substitute a written contract for that which might be implied from admissions, and to avoid the mischief arising from parol testimony to prove either an express promise, or facts from which a promise would follow as a legal and logical result. *Ib.*

## STEAMBOATS.

See ACTION, AND PARTIES TO, 2, 3.

1. Steamboat and railroad companies, in propelling boats on the river, and cars on the railroad, must provide all reasonable precaution, to protect the property of others, and they must also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to the circumstances of the danger. *Gerkee v. Cal. Steam Navigation Company*, 251.
2. What facts and circumstances constitute evidence of carelessness, is a question of law for the Court to determine. But what particular weight the jury should give to these facts and circumstances, is a matter for the jury. *Ib.*

## SUMMONS.

See PUBLICATION OF SUMMONS; ATTACHMENT, 5.

## SUNDAY LAW.

See CONSTITUTIONAL LAW, 10 to 38, inclusive.

## SUPERIOR COURT.

1. Whether the Superior Court of the city of San Francisco had jurisdiction to render a judgment over two hundred dollars, is no longer an open question: *Held*, that it had such jurisdiction, on the principle of *stare decisis*. *Curtis v. Richards & Vantine*, 33.

## SUPREME COURT.

See VERDICT, 1.

1. The Supreme Court will not disturb the findings of a Court or jury on account of conflicting evidence. *Scannell v. Strahle*, 177.
2. This Court will not hear any objections to an order entered in the Court below, by consent of parties. *Meerholez v. Sessions*, 277.

## SURETY.

See PROMISSORY NOTE, 1, 8, 9, 10; SHERIFFS, 8, 9.

1. The sureties upon the official bond of an officer are only responsible for the official acts, and not for private debts. *Hill v. Kemble et al.*, 71.

## SWAMP AND OVERFLOWED LANDS.

1. This State has the right to dispose of the swamp and overflowed lands granted to her by the Act of Congress of September 28, 1850, prior to the issuing of a patent from the United States, so as to convey to the patentee a present title as against a trespasser. *Owens v. Jackson*, 322.
2. The language of the Act of Congress conveyed to the State a present interest in the lands. The description of "swamp and overflowed lands" is sufficient to give the State a present *prima facie* right. *Ib.*
3. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive, as between the United States and the State. *Ib.*
4. Immediately upon the passage of the Act of Congress of September 28, 1850, this State became the owner, with absolute power of disposition, of all the swamp lands within her limits which had not been disposed of. *Summers v. Dickinson et al.*, 554.

5. The title of the State in no way depends upon a patent. The Act itself operated as a conveyance. *Ib.*
6. The Governor, in issuing a patent to an individual, of such lands, acts as the agent of the State, under powers conferred by Statute, and his authority extends only to such lands as were granted to the State by the Act of Congress. *Ib.*
7. A patent from the Governor, purporting to convey the lands of the State, can have no validity unless expressly authorized by law. *Ib.*
8. Such a patent is *prima facie* evidence of title in the grantee, as the law presumes in favor of the acts of all public officers. *Ib.*

## TAX COLLECTOR.

See SHERIFFS, 4, 5, 6.

## TITLE.

See SHERIFF'S SALES; REDEMPTION, 4, 7, 8; SWAMP AND OVERFLOWED LANDS; EXECUTION, 3.

1. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants. *Peabody v. Phelps*, 213.
2. All previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined. *Ib.*
3. If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. *Ib.*

## TRIAL.

See NEW TRIAL, 10; REFERENCE; WITNESS, 3, 4, 5.

## TRUSTEE.

See HUSBAND AND WIFE, 4.

1. A was indebted upon a note and mortgage to B, in the sum of \$40,000. B assigned the note and mortgage to C, and received from him his notes in lieu thereof. Afterward, A mortgaged to C, together with other property, the property previously mortgaged to B, subject to first mortgage, for which C was to advance to A, from time to time, sums of money not to exceed \$12,000, to enable A to pay his debts. By this mortgage C was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the \$12,000 and interest, and in case the rents should not be sufficient for that purpose, and A should not pay within two months after request, then C was to sell, and, out of proceeds, pay the amount and interest so advanced. C, at various times, advanced to A nearly \$12,000, and collected rents to the amount of \$28,000. Subsequently C died, and then his executor collected the rents: *Held*, in an action by A against C's administrator, that C acted in the purchase of the note and mortgage of B as an agent of A, and that A was entitled to the trust fund. *Gunter, Executrix, v. Jones, Guardian*, 643.

2. If the plaintiff allege an express trust, it is incumbent upon him to prove it as alleged; but such a trust may be proved by circumstances, and to ascertain the intention of the parties, the Court will consider the *then* existing circumstances. *Ib.*
3. A mortgagee, who is also a trustee, is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another *cestui que trust*. *Ib.*
4. A party seeking to enforce a trust against the administrator of a trustee, is compelled, from the complex nature of the cause, to ask relief in a Court of Equity. The claimant of specific property is not a creditor within the meaning of the Probate Law, and therefore he is not bound to present his claim to the administrator. *Ib.*
5. *PUR BURNETT, J., on rehearing.*—A trustee cannot, by mingling trust moneys with other funds, change his character from that of trustee to that of mere debtor. *Ib.*
6. The act of either the trustee or *cestui que trust*, without the consent of the other, should not be permitted to change the relation or capacity of the parties. *Ib.*
7. If the trustee does a wrongful act, then he by the act consents to be treated as a trespasser or debtor, at the option of the *cestui que trust*. *Ib.*
8. A trustee should never be permitted to defeat the rights of the *cestui que trust*, so long as it is in the power of a Court of Equity to enforce them. *Ib.*
9. When trustees act with good faith, in the management of the trust property, and without selfish motives, they are entitled to be treated by a Court of Equity with liberality and indulgence, and, especially, when they act under the advice of counsel. *Ellig v. Naglee and Sharp, Trustees*, 693.
10. Very supine negligence, or willful default, will render them liable; but to make them liable for mere errors of judgment, would tend to discourage good and prudent men from undertaking the trust. *Ib.*
11. Delay, on their part, in bringing suit to recover the rents of the trust estate, if subsequently approved by the *cestui que trusts*, will excuse them. *Ib.*
12. Money advanced by the trustees to the *cestui que trusts*, with the understanding that the same should be repaid out of the rents of the trust property, is a lien upon the net incoming rents, and not a lien upon the trust property. *Ib.*
13. The same is true respecting the charges for legal services of one of the trustees in the management of the trust property. The rents must be applied to the payment of such allowances until they are liquidated. *Ib.*

#### UNDERTAKING.

See DISTRICT COURT, 3; PLEADING, 4, 11, 28, 29.

1. An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. *Curtis v. Richards & Vantine*, 33.
2. The objection that an undertaking on appeal was not signed by the principal, has been decided by this Court in the case of *Curtis v. Richards & Vantine*, January Term, 1858. *Tissot and Wife v. Darling et al.*, 278.
3. It is the duty of a justice of the peace, when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day. *People ex rel. v. Harris*, 571.

VARIANCE.

See LIBEL, 1.

VENDOR AND VENDEE.

1. No eviction is necessary to enable a vendee to recover back the purchase money of real estate, where the sale was void under the Statute of Frauds. *Reynolds v. Harris*, 338.
2. Where a party contracts orally for the purchase of a house and lot, and furniture therein, and enters into the possession under such oral agreement, and the vendor subsequently fails to make a conveyance, the vendee has the right to quit the premises and return the personal property. *Ib.*

VENUE.

1. It is not error in the Court, on a trial for murder, to postpone the consideration of a motion on the part of the defendant for a change of venue, until an attempt is made to empanel a jury. *People v. Plummer*, 298.
2. Where a motion is thus postponed, and counsel for prisoner afterward declines, on the intimation of the Court, to renew the motion, he cannot take advantage, on appeal, of the failure of the Court to order a change of venue. *Ib.*
3. The right to have a cause tried in a particular county is one which a party may waive, either expressly or by implication. *Parker v. Freer, Sheriff*, 642.
4. An objection to the venue, if made on grounds appearing in the complaint, must be made at or before the time of filing the demurrer, or it will be deemed waived. *Ib.*

VERDICT.

1. The appellate Court will not disturb a verdict when the testimony is conflicting, or when the credibility of witnesses must be passed upon. *People v. Ah Ti*, 16.
2. The general rule as to the effect of a verdict upon defects in pleading, is, that wherever facts are not expressly stated, which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the Court, then the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment. *Garner v. Marshall*, 268.
3. An objection to the form of a verdict should be made on motion for a new trial. It is too late to raise it in this Court for the first time. *Douglass v. Kraft*, 562.

VERIFICATION.

See PLEADING, 12, 13, 17, 18, 20, 22, 23.

VESSEL.

See BAILMENT, 1, 2.

WITNESS.

See ASSIGNMENT, 1, 2.

1. A stock raiser is a competent witness to estimate the damage done to cattle by falling through a wharf. *Polk & Hensley v. Coffin & Swain*, 58.

2. The liability of a witness to either party, in case of a certain result of the suit, must be legal, and not moral, and the consequent interest present, certain, and vested, in order to exclude the witness. *Jones et al. v. Love et al.*, 68.
3. Where a party is called as a witness by the other side, and, on his cross-examination, testifies to new matter, his opponent may be called on his own behalf, in rebuttal of this new matter. *Ib.*
4. When the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived. *Ib.*
5. If a party be improperly joined as defendant, the Court or jury, upon application, should first pass upon his case, and, after he is discharged, he could then be examined as a witness for the other defendant. *Domingo v. Getman*, 97.
6. In an action by a company of miners to recover possession of a mining claim, and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. *Packer v. Heaton*, 568.

## A LIST OF MEMBERS OF THE BAR

### ADMITTED

SINCE THE ORGANIZATION OF THIS COURT.

---

Albertson, J. C.,  
Aldrich, Lewis,  
Allen, Horace,  
Amyx, Harrison,  
Anderson, Alexander,  
Anderson, James,  
Archer, Lawrence,  
Armstrong, John W.,  
Armstrong, W.,  
Ashley, David R.,  
Aud, Francis L.,  
Augney, W. Z.,  
Austin, E. G.

Baggs, Isaac,  
Bagley, David T.,  
Baine, A. C.,  
Baker, G. W.,  
Baker, Thomas,  
Baldwin, D. P.,  
Baldwin, Jo. G.,  
Barber, Henry P.,  
Barber, William,  
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 The above list exhibits the names of *those only* who have signed the Roll of Attorneys and Counselors.

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